

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~192~~ 23.

THE ST. ANTHONY FALLS WATER POWER COMPANY,
PLAINTIFF IN ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY
ST. PAUL.

No. ~~193~~ 24.

THE MINNEAPOLIS MILL COMPANY, PLAINTIFF IN
ERROR,

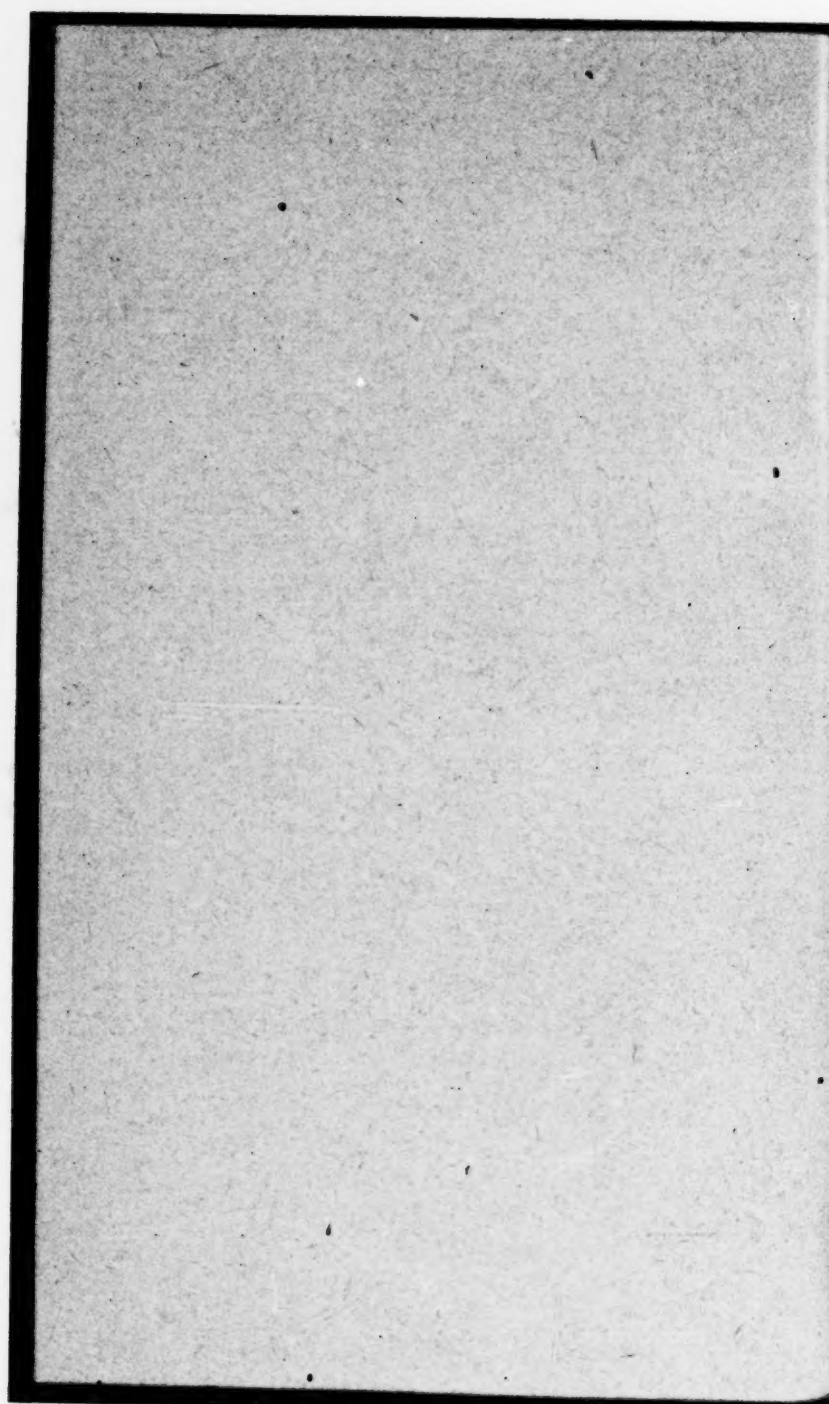
vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY
OF ST. PAUL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 17, 1894.

(15,683 & 15,684.)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 168.

THE ST. ANTHONY FALLS WATER POWER COMPANY,
PLAINTIFF IN ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY
ST. PAUL.

No. 169.

THE MINNEAPOLIS MILL COMPANY, PLAINTIFF IN
ERROR,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY
OF ST. PAUL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1893.

THE MINNEAPOLIS MILL COMPANY, Plaintiff, Appellant,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,
Defendant, Respondent.

THE ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff,
Appellant,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,
Defendant, Respondent.

(Two cases.)

2 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial Court.

THE MINNEAPOLIS MILL COMPANY, Plaintiff,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,
Defendant.

Complaint.

Plaintiff for complaint against the said defendant avers :

That the said plaintiff is a corporation organized by virtue of the Legislative Assembly of the Territory of Minnesota, entitled "An act to incorporate the Minneapolis Mill Company," approved February 27, 1856; and that the said defendant is a corporation organized pursuant to the act of the legislature of the State of Minnesota, entitled "An act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating the board of water commissioners," approved February 10, 1881, and as amended by the act of the legislature of the State of Minnesota, entitled "An act to amend and consolidate 'An act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating the board of water commissioners,' approved February 10, 1881, and the act amendatory thereof, approved the 25th day of January, 1883," approved March 4, 1885; which said act creating the corporate capacities of said plaintiff and said defendant for brevity are hereinafter referred to as the charters of said plaintiff and said defendant respectively.

3 And said plaintiff further avers that pursuant to the provisions of its charter aforesaid, it did acquire large tracts of land bordering upon the Mississippi river and on the right or southwesterly bank thereof, lying within the present limits of the city of

Minneapolis, in the county of Hennepin; that at and above the said lands so acquired by this plaintiff the said Mississippi river is by islands divided in two channels, in which the waters of said river naturally flowed; in one channel thereof at the easterly or north-easterly side of said islands there is a natural flow of about one-fourth of the whole water flowing in said river; that in the other or westerly channel there is about three-fourths of the waters; that in the bed of said river and the part thereof there was and is a natural depression or fall extending from nearly the head of Hennepin island down said river for the space of about one thousand feet, amounting in all to a fall of about seventy feet in the bed of said river adjacent to the lands owned by this plaintiff; that by reason of the fall or depression of said bed of said river adjoining the land of said plaintiff and the force of the water naturally flowing in said river over said bed, there was created a natural water power of great extent and value; that the said plaintiff, pursuant to the provisions of its said charter and in accordance with the natural right inherent in the ownership of the lands so abutting upon the waters of said river, at great expense constructed dams and water sluices for the purpose of making the said water power available for manufacturing and other purposes, to which the same was adapted, which dams in the westerly or main channel of said river and near the middle thereof were connected with the dams of the St. Anthony Falls Water Power Company, a similar corporation having the ownership of the land bordering on the easterly bank of said river and similar rights to extend its dams to a connection with the dams of said plaintiff in

the said main channel of said river; that by the erection of
4 said dams and the water sluices in connection therewith, the said plaintiff has made available the water power of said river and the fall thereof adjacent to its said lands, to the extent of about fifty feet of said fall, leaving still unoccupied a further fall of about twenty feet; that in further pursuance of said charter and in accordance with its said rights as riparian owner, the said plaintiff has made contracts with different parties for the construction of mills and manufacturing establishments in convenient proximity to its said water power, and for a valuable consideration has furnished and is furnishing water power to said different establishments, which said different establishments have use for the power derived from the entire water flowing in said river, and the said water and water power is of great value to the grantees and lessees of said plaintiff.

And plaintiff further avers that in and by the said grants and leases the said plaintiff has reserved to itself large rents and income therefrom.

And the said plaintiff further avers that by reason of its ownership of the land bordering upon said river and the westerly channel thereof, the said plaintiff acquired and still owns all the riparian rights incident to the ownership of lands bordering on said river; that the said Mississippi river is a natural water-course in which there naturally flows a large quantity of water derived from the said river and numerous tributaries thereof above the said water power of said plaintiff; that by reason of its said riparian rights the said

plaintiff is entitled to have and require the natural flow of the waters of said river in the said channels, both east and west, of said river adjacent to the land of said falls (of all the waters of said river) without diminution or diversion of the natural flow thereof by any person whatever.

And plaintiff further avers that one of the tributaries of the said Mississippi river is a natural water-course and stream known as Rice creek; that said creek drains waters from a large extent of
5 territory within the counties of Anoka and Chisago, in the State of Minnesota, which are all gathered together and have a natural flow or outlet through said creek into the Mississippi river in the county of Anoka about eight or ten miles above the water power of this plaintiff; that the said Rice creek in its natural course flows through a small lake in the county of Anoka, designated as Baldwin lake, and from thence to its connection with the Mississippi river as above named; that the amount of water flowing in said Rice creek and said Baldwin lake varies with the different seasons of the year; that in its medium and ordinary flow in and through said lake, the amount of water so flowing is about thirty millions of gallons per day; that in times of high water the amount so flowing is largely in excess of the said thirty millions per day.

And the said plaintiff further avers that the said defendant, assuming and purporting to act under the provisions of the said charter, has acquired title to a small portion of land bordering upon said Baldwin lake and upon the same has erected pumping works and machinery for the diversion of the waters of said Baldwin lake, and to cause them to flow into certain other lakes situated in the county of Ramsey, which other lakes have a natural outlet through streams flowing into the said Mississippi river within said county of Ramsey and below the water power of this plaintiff; that the said defendant in the furtherance of said purposes has for the greater part of the time during the two years last past by means of its said works, so erected on the shore of Lake Baldwin, withdrawn from said Baldwin lake the quantity of water ten million gallons per day, which said quantity so diverted by the said defendant has been caused to flow into a lake in said Ramsey county known as Pleasant lake, wherein by means of dams and other structures said water has been stored in said Pleasant lake in large quantities and from thence
6 drawn by the water works of said defendant to and into the city of St. Paul, in said county of Ramsey, whereby the said waters are distributed over said city and are used partly for domestic uses and partly for furnishing water for steam-engines and other manufacturing purposes, and water for the propulsion of elevators and other machinery, and the said waters are entirely diverted from the said Rice creek and that part of said Mississippi river above the water power of said plaintiff, and no part thereof is returned to said Mississippi river, above the water power of said plaintiff, so as in any way or manner to be made useful in said water power.

And said plaintiff further avers that the said defendant, although it has assumed and purported to act in accordance with its said charter, has not by any means acquired the right to divert the waters

naturally flowing in said Rice creek and through said Baldwin lake from their natural course, nor has it made compensation to this plaintiff and other parties beneficially interested in the use of said water, nor has it made or caused to be made any compensation or any provisions for computing the amount of compensation due to this plaintiff for damages to this plaintiff caused by diverting and withdrawing the waters of said river from their natural course and preventing the same from flowing over the dams and water power of said plaintiff.

And said plaintiff further avers that of the quantity of water so taken from said Baldwin lake, and diverted from the said Mississippi river above said water power, the said plaintiff is entitled to have and require to be permitted to flow in its natural course two-fifths, being the quantity naturally flowing in the west channel, being one-half the quantity flowing in the west channel of the said river; and that of the said ten million gallons a day heretofore by said defendant diverted from said Baldwin lake, without the diversion of the same, there would have come to the water power of said

plaintiff the quantity of six million gallons per day; that the
7 said last-named quantity of water flowing over the dams and structures of this plaintiff upon the head and fall secured by said structures, would have produced power to the extent of fifty horse-powers, which would have been of great value to this plaintiff, had not the same been diverted by said defendant; and plaintiff avers that by reason of the diversion of said water by said defendant, the expenses of maintaining its dams and water power are not diminished, but that its income and profits arising from the maintenance of said water power are diminished to the full amount of the rentals of said water power according to the grants and releases of the same, as hereinabove named, as applied to the useful purposes for which said water power is maintained; and that the damages heretofore sustained by the said plaintiff by reason of the diversion of the said water by said defendant is the sum of one thousand five hundred dollars.

And plaintiff further avers that it is informed and believes it to be true that it is the purpose and intention of said defendant to enlarge its works at said Baldwin lake, so as to take and withdraw from the said Rice creek substantially the whole quantity of water naturally flowing therein; that the said withdrawal of the whole of said quantity of water from said Rice creek will cause to this plaintiff great damages, not only for the actual value of the water power to be created by the natural flow of the water so diverted, but also from interference with and interruption of the operation of the mills and manufactories dependent upon said water power for power; which damages cannot be adequately compensated by any temporary computation thereof; by reason whereof and because the said plaintiff cannot have adequate redress in any ordinary action at law, the said plaintiff is entitled to have an injunction from this court, prohibiting the said defendant from further continuing the diversion of the said waters from the said Rice creek, unless the said defendant

shall, pursuant to the provisions of its charter, make compensation to this plaintiff therefor.

8 And plaintiff further avers that at and previous to the commencement of this action it did present its claims to the said defendant, together with the evidence upon which the same was based, and the same was considered by the said defendant and rejected by it.

Wherefore plaintiff demands judgment against said defendant for the sum of one thousand five hundred dollars, compensation for the damage and injury heretofore done by said defendant, and that by the judgment and decree of this court the said defendant, its servants, agents, and employés, be perpetually enjoined from interfering with or diverting the waters which would otherwise naturally flow in and through said Lake Baldwin, so as to prevent them from flowing in the natural course of said Rice creek and Mississippi river to the water power of said plaintiff; and that the said plaintiff may have such other and further relief in said premises as to the court may seem just.

BENTON, ROBERTS & BROWN,

Attorneys for Plaintiff.

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

THE MINNEAPOLIS MILL COMPANY, Plaintiff,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Defendant. }

Answer.

The defendant answers the complaint of the plaintiff in the above-entitled action as follows:

9 First. This defendant denies any knowledge or information thereof sufficient to form a belief as to any of the allegations in said complaint contained with respect to the incorporation of the plaintiff; but it avers that this defendant exists as a corporation and executive department of the city of St. Paul, of the State of Minnesota, under and by virtue of the acts referred to in said complaint, as approved February 10th, 1881, January 25th, 1883, and March 4th, 1885, and that this defendant under and by virtue of said acts and of the charter of said city of St. Paul exercises all of — authority of the city of St. Paul with respect to the acquiring of lands and franchises for and the construction of water works for the purpose of supplying the city of St. Paul and its inhabitants with pure water for all public purposes.

Second. This defendant denies any knowledge or information thereof sufficient to form a belief as to each and every allegation, averment, matter and thing in said complaint contained, commencing with the words, "And said plaintiff further avers that pursuant

to the provisions of its charter aforesaid," being in the fourth folio of said complaint, down to and including the words "diversion of the natural flow thereof by any person whatever," being in the tenth folio of said complaint, except that this defendant admits that the Mississippi river therein stated is a natural water course, and that some of the property therein referred to borders upon the said Mississippi river.

Third. This defendant avers that there is a creek or stream of water known as Rice creek which has its source northeasterly of the lake mentioned in said complaint and designated as Baldwin lake, and that the course of said creek after the same leaves Baldwin lake is to the Mississippi river, and that the same empties into the Mississippi river at about the place stated in said complaint.

This defendant avers that under and by virtue of the authority granted by the acts of the legislature, hereinabove referred to, and by the charter granted unto the city of St. Paul, this defendant has secured the right of way from the city of St. Paul to said
10 Lake Baldwin, and by the use of mains, ditches, pumps and engines it has drawn, and does draw water from said Lake Baldwin and bring the same to the city of St. Paul for the use of the said city and its inhabitants, and this defendant and the city of St. Paul is the owner in fee-simple of a large tract of real estate bordering on Lake Baldwin, upon which said tract of land it has erected buildings and placed therein pumps and engines for the purpose of drawing water from said lake for the purpose of supplying the city of St. Paul, as hereinabove stated, and this defendant has at times drawn water from said lake and conducted to said city as high as ten millions gallons of water per day; but it avers that at times that the water drawn from said lake is far less than ten millions gallons per day, while at other times during the year the defendant does not take any water from said lake.

Fourth. Except as hereinabove stated and as hereinafter stated, this defendant denies any knowledge or information thereof sufficient to form a belief as to each and every allegation, averment, matter and thing in said complaint contained and each and every part, portion and the whole thereof.

Fifth. This defendant avers that the Mississippi river named and mentioned in said complaint is a natural water-course and a public and navigable river of the State of Minnesota and of the United States, having its source many hundreds of miles north and northwest of the property of plaintiffs as described in said complaint, and that the amount of water flowing in said river is and always has been far more than the plaintiff could possibly control and use for the purposes mentioned in said complaint, and that the amount of water emptying into said Mississippi river from said Rice creek is so infinitely small compared with the amount of water otherwise flowing in said river that the same is of no value or use whatsoever
to the plaintiff in the operation of the *of the* machinery and
11 of the plant that plaintiffs have established, as stated in said complaint; and this defendant avers that it has the right — take said water from said Baldwin lake and conduct the same to

the city of St. Paul for the use of said city and its inhabitants without making any compensation or payment therefor to plaintiff.

Sixth. This defendant further answering herein avers that it has taken water from said Lake Baldwin during portions of the time stated in said complaint, and admits that it has never made compensation to plaintiff therefor, and avers that the water so taken has been for the use of this defendant and the city of St. Paul and its inhabitants, and this defendant is ready and willing to make compensation to plaintiff for the water that has been taken from said Baldwin lake and for the taking of water therefrom upon the assessment of such compensation by the jury in this action, provided the plaintiff on the trial shall establish its right to recover damages and compensation for the taking of the water by this defendant as herein alleged.

Wherefore this defendant demands judgment as follows:

(1.) That it be adjudged, decreed and determined that the plaintiff is not entitled to any relief in this action and that said plaintiff take nothing hereby.

(2.) That in case it is determined that plaintiff is entitled to recover compensation on account of the matters set forth in the complaint in this answer, then and in such case that the compensation that the plaintiff is entitled to recover for the right by defendant to draw and divert the water from said Lake Baldwin be assessed and determined in this action, and that defendant have judgment vesting in it the right to take and divert the water from said lake for the uses and purposes specified in this answer.

DAN. W. LAWLER,

Attorney for Defendant.

12 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

THE MINNEAPOLIS MILL COMPANY, Plaintiff,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Defendant. }

Reply.

Plaintiff above named for reply to the answer of said defendant avers, that no matter or thing in said answer contained is true, except as the same is expressly stated in and by the complaint in this action.

And for further reply to so much of said answer as seeks for and demands the assessment and determination of the compensation this plaintiff is entitled to recover for the right to draw off and divert the water of the said Lake Baldwin, avers that in and through said Lake Baldwin flow all the waters of Rice creek; that by reason of the great number of lakes through which said Rice creek flows above Lake Baldwin, there is opportunity for the storing of large

quantities of water that flow through said creek in times of high water, and by means of keeping back the said water and using the same in times of low water, together with the facilities for the storage of water in the lakes and reservoirs of said defendant below said Lake Baldwin, there can be had and made available for the use of said defendant the full amount of thirty million gallons per day, which amount withdrawn from the waters of said Rice creek and from the waters naturally flowing in the said Mississippi river will cause great injury and damage to the said plaintiff.

And plaintiff further avers that the amount of water that can so be drawn from Lake Baldwin is, as this plaintiff is informed
13 and believes, a larger quantity than is now necessary to supply all the public purposes for which the said defendant is permitted to take and appropriate water for its uses.

Wherefore this plaintiff prays that in and by the order of this court assessing compensation to be paid this plaintiff for the right to divert waters naturally flowing through said Lake Baldwin and said Rice creek, there be fixed a definite and certain limit for the amount of water so to be taken, and that the compensation therefore be adjusted accordingly; and the said defendant be restrained and prohibited by the order of this court from taking or diverting any of the waters of said creek in excess of the amount so fixed and limited; and the said plaintiff prays for such other and further relief as to the court may seem just.

BENTON, ROBERTS & BROWN,

Attorneys for Plaintiff.

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

THE ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff, }

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY ST. PAUL, }

Defendant.

Complaint.

Plaintiff for complaint against the said defendant avers:

That the said plaintiff is a corporation organized by virtue of an act of the legislative assembly of the Territory of Minnesota, entitled "An act to incorporate the St. Anthony Falls Water Power Company," approved February 26, 1856; and that the said de-
14 fendant is a corporation organized pursuant to the act of the legislature of the State of Minnesota, entitled "An act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water Company, and creating the board of water commissioners," approved February 10, 1881, and as amended by the act of the legislature of the State of Minnesota, entitled "An act to amend and consolidate An act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water Company,

and creating the board of water commissioners, approved February ten (10), 1881, and the act amendatory thereof, approved the twenty-fifth (25) day of January, 1883," approved March 4, 1885; which said act creating the corporate capacities of said plaintiff and said defendant for brevity are hereinafter referred to as the charters of said plaintiff and said defendant respectively.

And said plaintiff further avers that pursuant to the provisions of its charter aforesaid, it did acquire large tracts of land bordering upon the Mississippi river and on the left or northeasterly bank thereof, lying within the present limits of the city of Minneapolis, in the county of Hennepin; that at and above the said lands so acquired by this plaintiff, the said Mississippi river is by islands divided in two channels, in which the waters of said river naturally flow. In one channel thereof, at the easterly or northeasterly side of said islands, there is a natural flow of about one-fourth of the whole water flowing in said river; that in the other or westerly channel there is about three-fourths of the waters; that in the bed of said river and the part thereof there was and is a natural depression or fall, extending from nearly the head of Hennepin island down said river for the space of about one thousand (1,000) feet, amounting in all to a fall of about seventy feet in the bed of said river adjacent to the lands owned by this plaintiff; that this plaintiff, in addition to said lands on the east bank of said river,

15 acquired all of the lands bordering upon said river in the island known as Hennepin island; that by reason of the fall or depression of the bed of said river adjoining said land of said plaintiff, and the force of the water naturally flowing in said river over said bed, there was created a natural water power of great extent and value; that the said plaintiff, pursuant to the provisions of its said charter and in accordance with the natural right inherent in the ownership of the said lands so abutting upon the waters of said river, at great expense constructed dams and water sluices for the purpose of making the said water power available for manufacturing and other useful purposes to which the same was adapted; which dams in the westerly or main channel of said river and near the middle thereof were connected with the dams of the Minneapolis Mill Company, a similar corporation having the ownership of the land bordering on the westerly bank of said river, and similar rights to extend its dams to a connection with the dams of said plaintiff in the said main channel of said river; that by the erection of said dams and the water sluices in connection therewith, the said plaintiff has made available the water power of said river and the fall thereof adjacent to its said lands to the extent of about fifty feet of said fall, leaving still unoccupied a further fall of about twenty feet; that in further pursuance of said charter and in accordance with its said rights as riparian owner, the said plaintiff has made contracts with different parties for the construction of mills and manufacturing establishments in convenient proximity to its said water power, and for a valuable consideration has furnished and is furnishing water power to said different establishments, which said different establishments have use for the power derived from the entire

water flowing in said river, and the said water and water power is of great value to the said plaintiff.

And said plaintiff further avers that by reason of its ownership of the lands bordering upon the said river in the east channel thereof and upon said Hennepin island on both sides thereof, the said plaintiff acquired and still owns all the riparian rights incident to the ownership of lands bordering on said river; that the said Mississippi river is a natural water-course in which there naturally flows a large quantity of water derived from the said river and numerous tributaries thereof above the said water power of said plaintiff; that by reason of its said riparian rights the said plaintiff is entitled to have and require the natural flow of the waters of said river in the said channels, both east and west of said river adjacent to the lands of said falls, of all the waters of said river without diminution or diversion of the natural flow thereof by any person whatever.

And plaintiff further avers that one of the tributaries of the said Mississippi river is a natural water-course and stream known as Rice creek; that said creek drains waters from a large extent of territory within the counties of Anoka and Chisago in the State of Minnesota, which are all gathered together and have a natural flow or outlet through said creek into the Mississippi river in the county of Anoka about eight or ten miles above the water power of this plaintiff; that the said Rice creek in its natural course flows through a small lake in the county of Anoka, designated as Baldwin lake, and from thence to its connection with the Mississippi river as above named; that the amount of water flowing in said Rice creek and said Baldwin lake varies with the different seasons of the year; that in its medium and ordinary flow in and through said lake, the amount of water so flowing is about thirty millions of gallons per day; that in times of high water the amount so flowing is largely in excess of the said thirty millions per day.

And the said plaintiff further avers that the said defendant, assuming and purporting to act under the provisions of the said charter, has acquired title to a small portion of land bordering upon said Baldwin lake and upon the same has erected pumping works and machinery for the diversion of the waters of said Baldwin lake, and to cause them to flow into certain other lakes situated in the county of Ramsey, which other lakes have a natural outlet through streams flowing into the said Mississippi river within said county of Ramsey and below the water power of this plaintiff; that the said defendant in the furtherance of said purpose has for the greater part of the time during the two years last past by means of its said works, so erected on the shore of Lake Baldwin, withdrawn from said Lake Baldwin the quantity of water ten million gallons per day, which said quantity so diverted by the said defendant has been caused to flow into a lake in said Ramsey county known as Pleasant lake, wherein by means of dams and other structures said water has been stored in said Pleasant lake in large quantities and from thence drawn by the water works of said defendant to and into the city of St. Paul in said county of Ramsey,

whereby the said waters are distributed over said city and are used partly for domestic uses and partly for furnishing water for steam-engines and other manufacturing purposes, and water for the propulsion of elevators and other machinery, and the said waters are entirely diverted from the said Rice creek and that part of said Mississippi river above the water power of said plaintiff and no part thereof is returned to said Mississippi river above the water power of said plaintiff, so as in any manner to be made useful in said water power.

And said plaintiff further avers that the said defendant, although it has assumed and purported to act in accordance with its said charter, has not by any means acquired the right to divert the waters naturally flowing in said Rice creek and through said Baldwin lake, from their natural course, nor has it made compensation to this plaintiff and other parties beneficially interested in the use of said water, nor has it made or caused to be made any compensation or any provisions for computing the amount of compensation due to this plaintiff for damages to this plaintiff caused by diverting and withdrawing the waters of said river from their natural course and preventing the same from flowing over the dams and water power of said plaintiff.

And said plaintiff further avers that of the quantity of water so taken from said Baldwin lake, and diverted from the said Mississippi river above said water power, the said plaintiff is entitled to have and require to be permitted to flow in its natural course three-fifths, being the quantity naturally flowing in the east channel, and one-half the quantity flowing in the west channel of the said river; and that of the said ten million gallons a day heretofore by said defendant diverted from the said Baldwin lake, and without the diversion of the same, there would have come to the water power of said plaintiff the quantity of six million gallons per day; that the said last-named quantity of water flowing over the dams and structures of this plaintiff upon the head and fall secured by said structures, would have produced power to the extent of seventy-five horse-powers, which would have been of great value to this plaintiff, had not the same been diverted by said defendant; and plaintiff avers that by reason of the diversion of said water by said defendant, the expenses of maintaining its dams and water power are not diminished, but that its income and profits arising from the maintenance of said water power are diminished to the full amount of the value of the said water power as applied to the useful purposes for which said water power is maintained; and that the damages heretofore sustained by the said plaintiff by reason of the diversion of the said water by said defendant is the sum of three thousand dollars.

And plaintiff further avers that it is informed and believes it to be true that it is the purpose and intention of said defendant to enlarge its works at said Baldwin lake, so as to take and withdraw from the said Rice creek substantially the whole quantity of water naturally flowing therein; that the said withdrawal of the whole of said quantity of water from said Rice creek will

cause to this plaintiff great damages, not only for the actual value of the water power to be created by the natural flow of water so diverted, but also from interference with and interruption of the operation of the mills and manufactories dependent upon said water power for power; which damages cannot be adequately compensated by any temporary computation thereof; by reason whereof and because the said plaintiff cannot have adequate redress in any ordinary action at law, the said plaintiff is entitled to have an injunction from this court, prohibiting the said defendant from further continuing the diversion of the said waters from the said Rice creek, unless the said defendant shall, pursuant to the provisions of its charter, make compensation to this plaintiff therefor.

The plaintiff further avers that at and previous to the commencement of this action it did present its claims to the said defendant, together with the evidence upon which the same was based, and the same was considered by the said defendant and rejected by it.

Wherefore plaintiff demands judgment against said defendant for the sum of three thousand dollars (\$3,000), compensation for the damage and injury heretofore done by said defendant, and that by the judgment and decree of this court the said defendant, its servants, agents, and employes, be perpetually enjoined from interfering with or diverting the waters which would otherwise naturally flow in and through said Lake Baldwin, so as to prevent them from flowing in the natural course of said Rice creek and Mississippi river to the water power of said plaintiff; and that the said plaintiff may have such other and further relief in said premises as to the court may seem just.

BENTON, ROBERTS & BROWN,

Attorneys for Plaintiff.

20 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

THE ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff, }
vs. }
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. }
PAUL, Defendant. }

Answer.

The defendant answers the complaint of the plaintiff in the above-entitled action as follows:

First. This defendant denies any knowledge or information thereof sufficient to form a belief as to any of the allegations in said complaint contained with respect to the incorporation of the plaintiff; but it avers that this defendant exists as a corporation and executive department of the city of St. Paul, of the State of Minnesota, under and by virtue of the acts referred to in said complaint, as approved February 10th, 1881, January 25th, 1883, and March 4th, 1885, and that this defendant under and by

virtue of said acts and of the charter of the city of St. Paul exercises all of the authority of the city of St. Paul with respect to the acquiring of lands and franchises for and the construction of water works for the purpose of supplying the city of St. Paul and its inhabitants with pure water for all public purposes.

Second. This defendant denies any knowledge or information thereof sufficient to form a belief as to each and every allegation, averment, matter and thing in said complaint contained, commencing with the words, "And said plaintiff further avers that pursuant to the provisions of its charter aforesaid," being in the fourth folio of said complaint, down to and including the words "natural flow thereof by any person whatever," being in the tenth folio of said complaint, except that this defendant admits that the Mississippi river therein stated is a natural water-course, and that some of the property therein referred to borders upon said Mississippi river.

Third. This defendant avers that there is a creek or stream of water known as Rice creek which has its source northeasterly of the lake mentioned in said complaint and designated as Baldwin lake, and that the natural course of said creek after the same leaves Baldwin lake is to the Mississippi river, and that the same empties into the Mississippi river at about the place stated in said complaint.

This defendant avers that under and by virtue of the authority granted by the acts of the legislature, hereinabove referred to, and by the charter granted unto the city of St. Paul, this defendant has secured the right of way from the city of St. Paul to said Lake Baldwin, and by the use of mains, and ditches, and pumps and engines it has drawn, and does draw water from said Lake Baldwin and bring the same to the city of St. Paul for the use of said city and its inhabitants, and this defendant and the city of St. Paul is the owner in fee-simple of a large tract of real estate bordering on Lake Baldwin, upon which said tract of land it erected buildings and placed therein pumps and engines for the purpose of drawing water from said lake for the purpose of supplying the city of St. Paul, as hereinabove stated, and this defendant has at times drawn from said lake and conducted to said city as high as ten million gallons of water per day; but it avers that at times that the water drawn from said lake is far less than ten million gallons per day, while at other times during the year the defendant does not take any water from said lake.

Fourth. Except as hereinabove stated and as hereinafter stated, this defendant denies any knowledge or information thereof sufficient to form a belief as to each and every allegation, averment, matter and thing in said complaint contained and each and every part, portion and the whole thereof.

Fifth. This defendant avers that the Mississippi river named and mentioned in said complaint is a natural water-course and a public and navigable river of the State of Minnesota and of the United States, having its source many hundreds of miles north and northwest of the property of plaintiff described in

said complaint, and that the amount of water flowing in said river is and always has been far more than the plaintiff could possibly control and use for the purposes mentioned in said complaint, and that the amount of water emptying into the said Mississippi river from said Rice creek is so infinitely small compared with the amount of water otherwise flowing in said river that the same is of no value or use whatsoever to the plaintiff in the operation of the machinery and of the plant that it has established, as stated in said complaint; and this defendant avers that it has the right to take said water from said Baldwin lake and conduct the same to the city of St. Paul for the use of said city and its inhabitants without making any compensation or payment therefor to plaintiff.

Sixth. This defendant further answering herein avers that it has taken water from said Lake Baldwin during portions of the time stated in said complaint, and admits that it has never made compensation to plaintiff therefor, and avers that the water so taken has been for the use of this defendant and the city of St. Paul and its inhabitants, and this defendant is ready and willing to make compensation to plaintiff for the water that has been taken from said Baldwin lake and for the taking of water therefrom upon the assessment of such compensation by the jury in this action, provided the plaintiff on the trial shall establish its right to recover damages and compensation for the taking of the water by this defendant as herein alleged.

Wherefore this defendant demands judgment as follows:

(1.) That it be adjudged, decreed and determined that the plaintiff is not entitled to any relief in this action and that said plaintiff take nothing herein.

(2.) That in case it is determined that plaintiff is entitled to recover compensation on account of the matters set forth in the complaint in this answer, and in such event that the compensation plaintiff is entitled to recover for the right by defendant to draw and divert the waters from said Lake Baldwin be assessed and determined in this action, and that defendant have judgment vesting in it the right to take and divert the waters from said lake for the uses and purposes specified in this answer.

DAN. W. LAWLER,

Attorney for Defendant.

STATE OF MINNESOTA,)
County of Hennepin. }

District Court, 4th Judicial District.

THE ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff,)
vs.)
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,)
Defendant,)

Reply.

Plaintiff above named for reply to the answer of said defendant avers, that no matter or thing in said answer contained is true,

except as the same is expressly stated in and by the complaint in this action.

And for further reply to so much of said answer as seeks for and demands the assessment and determination of the compensation this plaintiff is entitled to recover for the right to draw off and divert the water of the said Lake Baldwin, avers that in and through said Lake Baldwin flow all the waters of Rice creek ; that by reason of the great number of lakes through which said Rice creek
24 flows above Lake Baldwin, there is opportunity for the storing of large quantities of water that flow through said creek in times of high water, and by means of keeping back the said water and using the same in times of low water, together with the facilities for the storage of water in the lakes and reservoirs of said defendant below said Lake Baldwin, there can be had and made available for the use of said defendant the full amount of thirty million gallons per day, which amount withdrawn from the waters of said Rice creek and from the waters naturally flowing in the said Mississippi river will cause great injury and damage to the said plaintiff.

And plaintiff further avers that the amount of water that can so be drawn from Lake Baldwin is, as this plaintiff is informed and believes, a larger quantity than is now necessary to supply all the public purposes for which the said defendant is permitted to take and appropriate water for its uses.

Wherefore this plaintiff prays that in and by the order of this court assessing compensation to be paid this plaintiff for the right to divert waters naturally flowing through said Lake Baldwin and said Rice creek, there be fixed a definite and certain limit for the amount of water so to be taken, and that the compensation therefor be adjusted accordingly; and the said defendant be restrained and prohibited by the order of this court from taking or diverting any of the waters of said creek in excess of the amount so fixed and limited; and the said plaintiff prays for such other and further relief as to the court may seem just.

BENTON, ROBERTS & BROWN,

Attorneys for Plaintiff.

25 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

THE MINNEAPOLIS MILL COMPANY

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL. }

THE ST. ANTHONY FALLS WATER POWER COMPANY

vs.

SAME DEFENDANT. }

(Two cases.)

Case with Exceptions.

The two above entitled actions came on for trial on the 22d day of May, 1893, at the general term of said court, before Hon. Thomas Canty, one of the judges of said court, and a jury; Messrs. Benton, Roberts and Brown appearing for plaintiffs and Leon T. Chamberlain, Esq., and Walter L. Chapin, city attorney and assistant city attorney of St. Paul, appearing for defendant; the issues being similar in both cases, it was agreed between the parties and consented to by the court, that the two actions should be tried together.

After the jury had been impaneled and sworn, counsel for defendant asked leave to withdraw that part of the answers in each case which asks for condemnation, being the sixth subdivision of each answer, and that part of the prayer in each answer which asks for assessment of compensation to plaintiffs for the right by defendant to divert water as specified in the answer, being the allegations and prayer as to condemnation.

26 To this request, plaintiffs objected for the reason that as the action now stands, defendant should not be allowed to withdraw that part of the proceedings which goes to condemnation as set up in its answers without the consent of plaintiffs; defendant having chosen to turn the proceeding into a condemnation under the statute, the action had been changed so that it was now substantially an action by the plaintiffs for the assessment of damages for the permanent taking of the rights in question, rights and property which defendant had already taken and was in possession of; and plaintiffs had prepared their case with this view. The defendant could not now change the nature of the action without the consent of plaintiffs. Plaintiffs further objected to defendant being allowed to withdraw condemnation proceeding, unless the condition were placed upon the defendant to pay the plaintiffs a proper amount for costs and disbursements and attorneys' fees occasioned by the preparation of that part of the case which goes to the condemnation proceedings, those costs and fees being expressly allowed by the charter of defendant.

The motion of defendant was granted, but without prejudice to

any right to costs which plaintiffs might have in the matter; to which ruling plaintiffs excepted.

Parties then agreed to waive a jury for the present trial, and have the remaining portions of the respective actions tried before the court; and the jury was thereupon discharged from further consideration of these actions, and the trial was proceeded with before the court.

Plaintiffs in each of said actions were allowed to amend their complaints by striking out the word "two" and inserting instead the word "three," so that the actions would stand as claiming damages for three years instead of two.

Exhibits "A," "B" and "C" were then introduced in evidence, being pages of the annual reports of defendant for the years 1890, 1891 and 1892, the statements in which exhibits are admitted to be true. These exhibits show the amount of water pumped by defendant from Lake Baldwin during the period indicated.

EXHIBIT "A."

Engineer's Report from Lake Baldwin Station for the Year Ending November 30, 1890.

Months.	No. of hours pumping.	No. of revolutions.	No. of gallons pumped.	Average per day pumped.
January, 1890.....	248	133,700	28,077,000	2,800,000
February, 1890.....	284	153,600	32,256,000	2,600,000
March, 1890.....	560	504,900	106,029,000	4,609,000
April, 1890.....	673	860,700	180,747,000	6,400,000
May, 1890.....	689	1,075,300	225,813,000	7,746,000
June, 1890.....	704	1,085,700	227,997,000	7,593,300
July, 1890.....	708	1,121,700	235,557,000	7,851,500
August, 1890.....	618	990,000	208,100,000	8,000,000
September, 1890.....	332	428,314	89,947,000	6,424,700
October, 1890.....	478	682,300	152,993,000	7,799,000
November, 1890.....	478	682,300	152,993,000	7,799,000
	5,299	7,104,400	1,491,926,000	

Total number of gallons pumped during the year 1,491,926,000
 Total number of tons of coal used during the year 531
 Total number of cords of wood used 766½

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EXHIBIT "B."

Annual Report of Water Commissioners, St. Paul Water Works Pumping Station, Baldwin Lake—Engineer's Report for the Year Ending November 30, 1891.

Months.	No. of hours pumped.	No. of revolutions.	No. of gallons pumped.	Average daily pumping.
December, 1890.....	699	1,165,500	248,251,500	8,000,100
January, 1891.....	726	1,279,900	279,018,200	9,000,500
February, 1891.....	216	255,200	55,673,600	6,100,000
March, 1891.....				
April, 1891.....				
May, 1891.....	216	356,000	75,859,800	8,000,000
June, 1891.....	599	1,094,500	249,546,000	9,000,000
July, 1891.....	727	1,395,900	318,265,200	10,266,600
August, 1891.....	643	1,022,700	233,165,600	7,521,400
September, 1891.....	626	744,700	162,334,600	5,411,400
October, 1891.....	720	1,114,000	243,000,000	8,000,000
November, 1891.....	720	589,600	117,920,000	3,906,000
Total.....	5,892	9,018,000	1,983,034,500	

Total number of gallons pumped during the year..... 1,983,034,500
 Total number of tons of coal used..... 75
 Total number of cords of wood used..... 797½

JACOB ABRESCH, *Engineer.*

28

EXHIBIT "C."

Of the city of St. Paul for 1892.

St. Paul Water Works Pumping Station, Baldwin Lake—Engineer's Report for the Year Ending November 30, 1892.

Months.	No. of hours pumped.	No. of revolutions.	No. of gallons pumped.	Average pumped daily.
March, 1892.....	119	160,600	36,616,800	7,323,360
April, 1892.....	707	1,242,400	283,267,200	9,442,240
May, 1892.....	645	1,165,100	265,642,800	8,569,122
June, 1892.....	653	1,108,800	252,806,400	8,426,880
October, 1892.....	96	155,200	35,385,600	8,348,400
November, 1892.....	704	1,228,400	280,075,200	9,355,840
Total.....	2,924	5,060,500	1,153,794,000	

Inventory of stock, December 1, 1892:
 402 cords of wood.
 45 tons of coal.
 40 gallons cylinder oil.
 25 gallons kerosene.
 20 gallons engine oil.

JACOB ABRESCH, *Engineer.*

RUEBEN C. BENTON, witness sworn on behalf of plaintiffs, testified as follows :

As attorney for the St. Anthony Falls Water Power Company I presented the matter of the claims of that company to the St. Paul water board some time last year. I did this by these two letters, Exhibits "D" and "E."

EXHIBIT "D."

JUNE 15, 1892.

Board of water commissioners, St. Paul, Minn.

GENTLEMEN: I am instructed by the St. Anthony Falls Water Power Company to call your attention to the fact that the water you are drawing from Baldwin lake diminishes the water power of that company and injures the company to that extent, and the water power company claims as damages the value of its share of the water power withdrawn from the Mississippi river by your pumping station at Baldwin lake.

29 I am assured by the officers of the company that when you are prepared to admit the right of the company to recover damages, we shall have no difficulty in adjusting the amount nor in making arrangements for your future use of the water from that lake, for just as long or just as short a time as you may determine.

The water power company will be very glad to accommodate you if you desire to abandon the use of the lake, because it is so situated as to prefer the water itself to any measure of damages it could justly claim from you.

Upon the authorities cited on the trial of the Brooks case, I think there can be no question but that the water power company is entitled to compensation for the actual value of the water you take away from it. Please let us hear from you.

Yours truly,

R. C. BENTON.

(Ref. to the att'y.)

EXHIBIT "E."

NOVEMBER 12, 1892.

Board of water commissioners, city of St. Paul.

GENTLEMEN: Allow me to again call your attention to the claim of the St. Anthony Falls Water Power Company against your board for water taken from their water power during the last two years. I wrote you some time in the summer about this claim, but since that time I have noticed that your city attorney has been otherwise engaged. Trusting that he may now have time to examine the matter carefully, I ask your consideration of the matter. I also now represent in the same matter the Minneapolis Mill Company, the owner of the remainder of the water power, in this city. It seems to me from the authorities cited in the trial last spring, there can be no doubt that your board is bound to pay the actual damage caused by withdrawing the water from the river, and if suit is brought, you will be obliged to do as you did in the other trial—

change the suit into a condemnation proceeding, by which you will be obliged to pay for the water, whether you use it or not. The companies I represent here would prefer to have you let them have the water rather than any damages, and will be willing to settle for the actual value of the water you take from year to year, and should you ever change your manner of taking water and abandon your works at Baldwin lake, they will be very glad to take the water, instead of pay for its use. Please let us hear from you as soon as possible.

Yours truly,

R. C. BENTON.

(Ref. to att'y.)

I also, some time at or before the trial of the action that was brought and tried last year against this same defendant in favor of Fridley Mill Company, had some conversation with the attorney of the defendant, Mr. Phillips, and during the trial I had some conversation with the president of the defendant, Mr. Hoyt. I wrote these letters as attorney of the St. Anthony Falls Water Power Company in reference to the matter now under consideration.

(Exhibits "D" and "E" were offered in evidence, objected to by defendant as incompetent, irrelevant, and immaterial for any purpose, and were received.)

I had a conversation somewhere about the time of the trial of the Fridley case, with Mr. Phillips, attorney for the defendant.

Defendant here objected to any conversation with attorney of the board, which objection was sustained; to which ruling plaintiffs excepted.

I also had conversation with the chairman of the board, in which I explained to him the position of the mill company, plaintiffs in this action, and gave them notice of the demand we should make. That was a verbal notice. That was somewhere about the time of the trial of the case of Brooks and Byerly, the Fridley owners, against defendant. I gave them notice of the claim. That trial was a year ago this week. In answer to my letter I received a letter from Mr. Caulfield, secretary of defendant. This letter marked Exhibit "F."

EXHIBIT "F."

ST. PAUL, MINN., Nov. 28, 1892.

R. C. Benton, Esq., Minneapolis, Minn.

DEAR SIR: Your communications of June 15th and November 12th referring to alleged damages to the St. Anthony Falls Water Power Company and the Minneapolis Mill Company, by the taking of water from Baldwin lake for the supplying of the city of St. Paul with water, were received and referred to the corporation attorney. Upon investigation by him, he does not consider the pretended rights of the above companies similar to the

rights of the parties owning the mill at Fridley, and which were determined in the April, 1892, term of the Hennepin county district court.

The board of water commissioners, at a meeting held November 22, 1892, refused to recognize the validity of the claims, disallowed them, and instructed me to notify you to that effect.

Very respectfully yours,

JOHN CAULFIELD, *Secretary.*

(Defendant admits Exhibit "F" to be written by Mr. Caulfield, secretary of defendant.)

The time I had my conversation with the attorney of the board and with Mr. Hoyt, chairman, was about the time of the trial of the Brooks and Byerly case against defendant. Whether it was before or after I cannot state definitely now; but if it was after, it was within a few days after.

Cross-examination :

These letters I wrote do not contain all the evidence I submitted to the board, except what I submitted by word of mouth. In the conversation I had I referred the board to the whole testimony that was developed on the other trial. Mr. Hoyt was the man I talked with; he was director or superintendent of the board. The conversation was in this city, about this court-house. This conversation was had while Mr. Phillips was here in the matter of this water business in the previous suit of Brooks and Byerly against this water defendant. I referred to the matter that we had other claims. We were attorneys for Brooks and Byerly in the previous suit. I specified the St. Anthony Falls Water Power Company. I did not specify the Minneapolis Mill Company. I was not attorney for it at the time; but I see that I do in this letter. Conversation was entirely

32 in reference to the St. Anthony Falls Water Power Company, for which I was attorney at the time. I do not think I stated the amount of the claim, but reference is made to the fact that they were taking the water there; that during the whole time that they had been taking the water they had been encroaching upon the rights of the St. Anthony Falls Water Power Company.

(Plaintiffs were given leave in each of these actions to amend those portions of the complaints which contain the allegations in regard to notice by plaintiffs of their claims; and it was ordered that the said complaints should be understood to be amended so as to contain allegations of all the facts in regard to the giving of notice which had appeared, or should appear in evidence.)

DANIEL L. CARLTON, XAVIER DELONY and HERMAN J. VAN ELSBERG, witnesses sworn in behalf of plaintiffs, testified, that they were residents in the vicinity of Rice creek and Lake Baldwin and had been well acquainted for more than thirty years with the creek; that they had crossed the creek between Lake Baldwin and the

Mississippi river at all times of the year, winter and summer and in the fall a great deal; that the creek was a stream of water flowing the year round, both winter and summer, and that it could be traveled upon in a boat; that it runs from above Lake Baldwin through a series of lakes, through Lake Baldwin to the Mississippi river, and that with one exception, which was 1891, it could be traversed with a boat above and below Baldwin, and that at ordinary seasons of the year the water below Lake Baldwin and above Long lake, was two feet deep at some places and two rods wide, that two feet of water would be the ordinary summer stage of water in Rice creek at the outlet of Baldwin; that the summers of 1889, 1890 and 1891 were very dry and that in 1891 the stream was the driest the witnesses had seen. Rice creek has always run in well-defined banks in all ordinary seasons having most of it a good current, and some of it very quick. The outlet

33 of Lake Baldwin is this creek—Rice creek—and Lake Baldwin has no other outlet; that there is a sand bar about 500 feet below Lake Baldwin on Rice creek called the "crossing," and that in ordinary seasons in ordinary years the water is about forty feet wide on this sand bar and from one and a half to two feet deep, with a current almost all the way across it. There was about half as much water in the creek in 1889 as before, and in 1890 there was about half as much as there was in 1889, and in 1891 it was dry during the latter part of August and first of September, which was the only time witnesses had known of its being dry. That there was another ford about half a mile below this sand bar where in ordinary years the water was from two feet to feet and a half feet deep and two rods wide, with a current little stronger than at the crossing above; that the current at this point is 100 feet a minute at ordinary times of the year; that in the summer season of 1892 the water was again at the ordinary stage, following the dry seasons of 1889, 1890 and 1891; that in 1891 when the creek was dry below Lake Baldwin, it was not dry above Lake Baldwin, though it did not lack much of it, and at this time defendants were pumping water and had been all summer; that in ordinary seasons a person could pass through the outlet of Lake Baldwin down Rice creek in a canoe, and that at the outlet the water was about forty feet wide and about a foot and a half deep. All the streams in the vicinity were low during 1889, 1890 and 1891, some entirely dry and others low. The culmination of the dry season was in 1891.

(Upon plaintiffs offering further evidence as to character of Rice creek, defendant's counsel stated that he did not pretend that water run out from Lake Baldwin at any other place than through Rice creek, and that he would admit that the stream is a natural stream and is the only outlet to that lake.)

JOHN T. FANNING, witness, sworn in behalf of plaintiffs, testified as follows:

34 I have been hydraulic engineer for thirty years and had charge of water powers in Minneapolis, Great Falls, Montana, Spokane Falls, Washington, Austin, Texas, and have been engineer

on public water supplies in many cities, including Rockford, Illinois, St. Albans, Vermont, and a number of others, and have been engaged in the construction of water powers and public water supplies in Norwich, Connecticut, Manchester, New Hampshire, St. Albans, Vermont, Boston, Massachusetts, and a hundred or more other different cities in the United States; have designed and constructed mills and shops, and have published a great many reports of my observations in scientific papers, and am the author of a treatise on water supplies and engineering, which was first published in 1877, and has run through ten editions, and which work is accepted as the authority in my profession, as I understand.

(Mr. Fanning's qualifications to testify as an expert are here admitted by Mr. Chamberlain.) My chief work in this city has been my connection with the St. Anthony Falls Water Power Company, in rebuilding the dams for that company in 1888 and 1889, at which time I was chief engineer and agent for the company. I also had charge of the general business of the company from 1887 to 1890. I began rebuilding the dam in 1887. I have observed the water power at St. Anthony falls very closely, and prepared plans for the development of the fall, and have taken observations of the fall and the condition of the bed of the river at the places where these falls are located, and of the quantity. My official connection with the St. Anthony Falls Water Power Company ceased about February 1st, 1890, but I have continued to watch the flow of the river. Within the last four or five years I have observed Rice creek which flows out of Lake Baldwin into the Mississippi river, and am acquainted with that creek from the place where it flows into the Mississippi river along its course through and above Baldwin. I have made observations for the purpose of judging the quantity of water flowing through the creek at different points, and the facilities for gathering water upon the water-shed and the area of the water-shed. I made this map, Exhibit "G," which is drawn to the same scale as the county map. This Exhibit "G" indicates the course and source of Rice creek, its direction of flow, and the upper lakes that are on the stream, from which it flows and through which it flows. Baldwin lake is in the town of Centerville, Anoka county. The course of Rice creek from Lake Baldwin is in a southwesterly direction, emptying into the Mississippi about eight miles above the water power of plaintiffs in these cases, in the city of Minneapolis.

Immediately above Lake Baldwin it flows from a series of lakes which lie generally northeast from Lake Baldwin, and above the lake called Peltier there are three branches. These three branches gather into Lake Peltier. One of these branches has its source in Bald Eagle lake and the lake which drains into that, another branch has its source in a lake called Rice lake, and another has its source in Clear lake; the stream at Bald Eagle lake comes from a southeasterly direction, at Rice lake it is from nearly an easterly direction, and from Clear lake it is from a northerly direction of Baldwin lake. It is about ten miles in an air line from Clear lake to Lake Peltier on a northerly branch and about the same distance on the southeasterly branch to Lake Peltier and about seven miles from

Bald Eagle lake to Lake Peltier. From Lake Peltier to Lake Baldwin is about six miles in an air line. From Lake Peltier the stream flows on through George Watch lake, next through Marshan lake, next through Rice lake and then into Baldwin lake. I have examined this stream at different points, and with reference to the water-shed which it drains. The outline of the water-shed which it drains is indicated on this map, Exhibit "G," which is drawn to the same scale as the county map hanging there. From my obser-

36 vations I am able to state that the natural course of Rice creek is substantially as indicated on Exhibit "G." The natural flow of the stream is generally in a southwesterly direction into Baldwin lake and then into the Mississippi river at Fridley. The line which embraces the area of the water-shed of Rice creek is indicated upon Exhibit "G" by the blue line, and from my observation I am able to say that the natural drainage of this water-shed is through Baldwin lake and through Rice creek.

I have observed the pumping station of defendants at Baldwin lake. I have seen it several times, and about a year ago I was at the station and examined particularly when they were in operation and observed to what place the water was being pumped from Baldwin lake. It was being pumped over the ridge to another water-shed in which lies Charles lake and Pleasant lake and which have their natural drainage in another direction. The direction in which it was being pumped is indicated upon Exhibit "G" by a red line, and the position of the pumping station is indicated by a square and the word "pumps." I am familiar with the water-shed into which the water is pumped.

The outlet of the water from that water-shed is by Charles lake into Pleasant lake southerly and toward the city of St. Paul. It goes from Pleasant lake into Succor lake, and thence to Vadnais lake, and thence into a brook which passes through the city of St. Paul, and also into an artificial conduit leading from Vadnais lake into the city of St. Paul, which conduit is maintained by the city of St. Paul, and then it runs through pipes which lead to the city of St. Paul. After the water is used in St. Paul, whatever water is returned to the river passes by the city sewers to the Mississippi river at St. Paul, twelve miles below the water power of plaintiffs. I have examined the pumping works of defendant on Lake Baldwin. It is a steam-pumping station with a capacity of ten million gallons of water in 24 hours. The water is drawn from Lake

37 Baldwin through a flume from the lake to the pumping station which is situated not far from the shore of the lake, and thence is pumped in a long flume which is upon the ridge between the Rice creek water-shed and the water-shed of Pleasant lake, and from the ridge it goes through a ditch into the Pleasant lake water-shed. This ditch is artificial for a considerable distance from the summit of the ridge. I could see no other water flowing into the ditch except what came from the pumping station. As an engineer, from the observations I have made, I am able to say what effect it would have upon a quantity of water passing the water power of plaintiffs in this city to pump a quantity of water from

Lake Baldwin, as this water is pumped by defendant. The effect would be to reduce the flow of water at St. Anthony falls. As an engineer, from the observations I have made, of this creek and the flow from Lake Baldwin down to the water power of plaintiffs, I am able to state in what proportion the diminution would be caused at the water power of plaintiffs by pumping a certain quantity at Lake Baldwin. In my opinion that diminution would be 95 per cent. of the quantity pumped away from Lake Baldwin—that is if one million gallons were pumped out of Lake Baldwin, 95 per cent. of that pumped away would be taken away from the power of the plaintiffs. Between Lake Baldwin and the water power of plaintiffs there would be some diminution caused chiefly by evaporation, and this evaporation between Lake Baldwin and the water power of plaintiffs would be substantially the same in case the quantity in the stream were varied one million or ten million gallons. The evaporation is generally the proportion to the surface of the stream. Basing my estimate on ten millions of gallons taken out of Lake Baldwin, I think the diminution of the water power of plaintiffs would be in the same proportion—that is the proportion of the evaporation would be about the same between Lake Baldwin and the water power of plaintiffs.

38 In my examination of the Rice creek water-shed I found that White Bear lake has its natural outlet through Bald Eagle lake into Baldwin. I have computed the area of the water-shed of Rice creek above Lake Baldwin and I find it to be 130 square miles.

(Plaintiffs at this point introduced in evidence statement of rainfall since 1857 for the locality in which is included the Rice creek water-shed.)

Witness continued: I have computed the average rainfall since 1871 for this locality and it is 29 inches per year.

(Plaintiffs here offer to show by the witness that from his experience as an engineer and his observation of this water-shed, the flow and rainfall and other circumstances in connection with this Rice creek, that he is able to state what amount of water would be delivered from Lake Baldwin as an ordinary summer flow in the ordinary year.

(Objected to by defendant on the ground that it is incompetent and irrelevant. Objection sustained, with exception to plaintiffs.)

(Plaintiffs also offer to show that this witness is able to state, and that the fact is that this water-shed above Lake Baldwin in an ordinary year would give a flow exceeding thirty million gallons per day as the ordinary summer flow out of Lake Baldwin, which was objected to by defendant as incompetent and irrelevant; and the objection was sustained with exception to plaintiffs.)

(The charters of the two plaintiffs were here read in evidence by their titles, being chapter 137, Special Laws of 1856, for the St. Anthony Falls Water Power Company, and chapter 145 of the same year for the Minneapolis Mill Company.)

Map shown witness and marked Exhibit "H."

Witness further testifies this is a map of St. Anthony falls and vicinity on the Mississippi river, and shows the locality of the water power of plaintiffs in these actions which are at the head of

39 Hennepin island just below Nicollet island in the Mississippi river in the city of Minneapolis. I have made observations as to the nature of the stream and the bed of the stream in this locality. The St. Anthony Falls Water Power Company's works are on the east side and the Minneapolis Mill Company's works are on the west side opposite the St. Anthony Falls Water Power Company's works. I have made observations as to the natural flow and fall of the river. The fall from the top of the dam near the west gate at east end of the new dam to the surface of the water in the Pillsbury tail race on the east side there is a fall of 49 feet, and from the top of the same dam down to opposite 11th avenue on the easterly side there is a fall of 71½ feet in the ordinary stage of the river. All of this fall is not yet utilized. The head utilized is 49 feet. For the purpose of utilizing this fall on the east side of the river dams have been built and tail races constructed at each of the mills; mills have been built there for using this power, tail races have been constructed at which mills may be placed. Just above the falls the river is divided into two channels by Nicollet island; a part of the stream flows on the east of Nicollet island and a large part on the west side of Nicollet island; these are known as the east and the west channels. For the purpose of utilizing this fall on the east side the dams of the St. Anthony Falls Water Power Company were chiefly rebuilt in 1887, 1888 and 1889. These dams are indicated on this map. In rebuilding these dams they were rebuilt at the same height and position that the old dams were. The old dams had existed there since 1856. Minneapolis Mill Company dam and the St. Anthony Falls Company dam join each other in the middle of the west channel of the Mississippi river; the dams of the Minneapolis Mill Company extend down opposite the head gates of their canal. The power of the St. Anthony Falls Water Power Company is used for driving machinery. There is a canal opening out 40 of the pond on the east side following down on to Main street, which furnishes power to two flouring mills, the Pillsbury "A" and the Stamwitz & Schober. There is also a saw-mill near the easterly shore of Hennepin island; there is also a turbine wheel located for furnishing power for manufactures on Nicollet island. The water for the power is furnished by the Water Power Company. The power is also used by the Herzog Company, whose shop adjoins the Pillsbury "A" mill on the east side. On the west side the water is taken from the pond into the canal and is supplied to the wheels of the various mills, situated as indicated in Exhibit "H."

The Mississippi river at these falls is not navigable. In its natural state, the river is not navigable at ordinary stages of water for a half mile below St. Anthony falls, and in its natural state it is not navigable immediately above the falls, but is navigable in its natural state above Nicollet island.

I have examined the bed of the river above the falls, eight or nine hundred feet above the natural fall. In its natural state the

river would have been rapid, because the ledge which forms the bed of the river has considerable inclination. The use which the St. Anthony Falls Water Power Company makes of this water is, that it leases it for the purposes of getting rental for it, and it maintains this dam for the purpose of leasing this water power, and for furnishing the water power to consumers at a rental, and these parties that I have stated as using the water on the east side, use it under leases from the St. Anthony Falls Water Power Co., and they so used it during the years 1890, 1891 and 1892.

I have made observations to determine the proportionate amount of water in the Mississippi river which would flow, by the natural flow in the different channels of the river, in order to determine the comparative amount that would naturally flow if the dams were not there, and I found that it was one-third in the east channel and two-thirds in the west channel. The amount that would
41 naturally flow at the ordinary stage of water would be the same. These figures that I have given would be the same as though the dam was removed.

The value of water power is computed by units of horse-powers and also by mill-powers, the horse-power being the primary unit and the mill-power in this city being computed as 75 horse-power, which is determined by a mechanical effect under the head of power. Given the number of gallons or cubic feet flow per second flowing out of a certain place, and given the fall at which it is used, I can determine the number of mill-powers or horse-powers, and in the same way I can reduce mill-powers into horse-powers and cubic feet per second and gallons. I was manager for the St. Anthony Falls Water Power Company for four years. I am acquainted with the market value of water power in this vicinity during the years 1890, 1891 and 1892, and particularly at the place of these falls. That value was \$20 per horse-power per year, which is equal to \$1,500 per mill-power per year. A million gallons falling through a 49-foot head per day would be equivalent to a product of $8\frac{1}{2}$ horse-powers, and it is a matter of mathematical calculation to get the values of a million gallons of water from the value of the mill-power. I have made this computation and the value of a million gallons would be 80 cents. I estimate that at 24 hours a day, though at these falls the estimate varies from 16 to 24 hour days.

Referring to the Rice Creek water-shed, it has a very large lake surface, and the result is that the facilities for storing the water are very great; the lakes act as a reservoir and make the flow of the stream much more even than would be the case in a hilly water-shed: it makes the flow more even and the droughts would not ordinarily be as severe as in the hilly water-shed. The lakes make a natural storehouse for the waters during flood seasons.

42 Cross-examination: *

There is about 25 square miles of water surface in the Rice Creek water-shed above Lake Baldwin, and considerable swamps; the swamps hold the water back to some extent. The tendency is, the

more rapid the water is drawn off from Baldwin the more rapidly the water comes in to take its place. A surface forty feet wide and flowing at the rate of one hundred feet a minute would have to be about three inches deep in order to flow ten million gallons a day. Lake Baldwin is less than a square mile in area, ordinarily about one-third of a square mile. The quantity of water that flows out of Rice creek depends on the height of water in Baldwin lake. If ten million gallons were pumped out of the 25 miles of water surface, it would only reduce the water in Baldwin lake proportionately to the area from which it is pumped. If ten million gallons is pumped out of Lake Baldwin today, Rice creek would not flow ten million gallons less immediately, but it would come to that eventually.

There are waste-gates in plaintiffs' dam for the purpose of drawing down the pond, in case we had work to do in the pond. I do not think these gates were open in 1890. The Government has a gate to let logs through, which is not in the St. Anthony Falls Water Power Company's portion of the dam, but is on the west side of the river. Logs were run through for the year 1890, I think, but do not know how many times. When this gate is open it draws water from the pond. A portion of the river, about 200 feet, is occupied by a saw-mill dam, which has gates, through which the saw-mills were using the greater part of the season one hundred and fifty cubic feet a second, which is very nearly one hundred million gallons a day, this use continued from the time the ice went out in April until the closing in November—about the 12th of November, and began about the 15th of April. This Government gate is at

the end of the Minneapolis Mill Company dam on the
43 shore on the west side, and has been used for sluicing logs.

When I said the Mississippi river was not navigable at these falls, I meant that it was not navigable with boats—that boats could not go up and down in its natural condition. It is always used for logs with the shutes that are prepared artificial. It is navigable below the rapids and is navigable above the rapids, but the dam makes it so. It is navigable above the rapids for the purpose of running shallow boats and for floating logs. The rights of the saw-mill are right— which are leased from the St. Anthony Falls Water Power Company. Their saw-mill is on their own land. I mean to say that the result on the Mississippi river of taking one million gallons out of Baldwin lake is to reduce the flow of that much water passing through plaintiffs' dams, which result would show itself in the time it would take to flow down, about 24 hours. The immediate result would not be to reduce the flow of Rice creek to the full amount taken out of Baldwin lake, but if continued it would come to that condition if it was continued through the summer season. There was four or five months in the year 1890 when the Mississippi river had more water than the plaintiffs are in the habit of using, as in time of floods. Given a definite amount of water taken out of Baldwin lake in certain months in the years 1890, 1891 and 1892, I could only approximate the percentage of decrease of the water that would flow past plaintiffs' dams. In

1890, water was flowing over the plaintiffs' dam from April 1st until July 7th.

Q. About how much water, on an average, was flowing over them?

Objected to by plaintiffs as irrelevant and immaterial; objection overruled, with exception to plaintiffs.

A. Taking the flood time into consideration I think there was more than ten million gallons a day running over during those months. There were no other months in that year in which

44 the water was flowing over the dam. This 200 feet of dam through which the lumber company takes water out of the pond, is operated by the lumber company under a water right which was sold to them under the condition that they should maintain that part of the dam. The lumber company maintains the dam. This one hundred million gallons of water they use is used to run their machinery, a part of it they used under their deed and a part of it under their lease. Besides this they use five or six million gallons a day for sluicing logs. Possibly, they use more than this. The use, by this lumber company, of water in 1891 was substantially the same as in 1890. Mr. De la Barre succeeded me, in 1891, in managing the St. Anthony Falls Water Power Company.

Q. Is there any wastage in that river through these dams beside that which you have mentioned?

To which question plaintiffs objected on the ground that it is immaterial and irrelevant; and also because the question assumes that the quantities already testified to were wastage. Objection overruled, with exception to plaintiffs.

A. I do not know of any in connection with the St. Anthony Falls Water Power Company, or in connection with the Minneapolis Mill Company.

Q. Have you ever seen water wasting on the Minneapolis Mill Company's dam?

A. I have seen it flowing over the dam.

Q. Have you ever seen it wasting in any other respect?

Objected to by plaintiffs as irrelevant and immaterial; objection overruled, with exception to plaintiffs.

A. Well, I have seen the water getting through the dam, soon after the ice goes out. This is usually in the spring after the ice has torn off some of the boards, which occurs every year. This was when the water was not flowing over the dam. I could not state the extent of this loss. It takes nine million gallons flowing continually every 24 hours to make 75 horse-power, that is a mill-power, at the falls of the St. Anthony Falls Water Power Company.

45 A mill-power is worth \$1,500 a year. There are old leases for for \$1,000 a year. The applied power on a wheel is about 80 per cent. of the theoretical power of the water; but the \$1,500 is charged for the theoretical power, by the measure of the water and not by the measure of the applied power. Referring to

Exhibit "II" this water is used on the St. Anthony Falls Water Power Company's side by letting it out of the river above the dam across Main street and over to the Pillsbury "A" mill through the canal under Main street. That is the way it is used by the Pillsbury mill. The land on which it is used belongs to the Pillsbury "A" Mill Company and the water is carried down through the sluice and back again into the river down below their mill. Between three and four thousand horse-powers ordinarily are thus conducted through this sluice to the Pillsbury "A" mill and other powers away from the land of the plaintiffs, and is applied outside of the territory of either one of these plaintiffs. The dam of McMullan & Company, which is the lumber company I referred to, extends at right angles with the stream 200 feet out in the stream. The turbine wheel that Herzog Company uses is on the west side of Main street on the land of the St. Anthony Falls Water Power Company. All that part of this dam that runs into the river easterly of the center of the west channel is owned by the St. Anthony Falls Water Power Company, the remainder of it on the west side belongs to the Minneapolis Mill Company. The gates in the dams control the flow of water to a certain extent, there may be more of a draught on one side than on the other and it flows proportionately as it is used. And so if the Minneapolis Mill Company gates are shut down the St. Anthony Falls Water Power Company draws more water than its proportion if it requires it for use, and *vice versa*. The height of the dam varies according to the bed of the river from 16 feet at the lower end to 6 feet at the upper end; the top of the dam is practically level. The Government gate

46 in the Minneapolis Mill Company's dam is near the letter "A" on Exhibit "II." There is some leakage through the dam at this point, but water is rarely running on the other side of the dam at this point, when the water is not running over the dam. The water runs over the dam generally on Sundays. I cannot tell how much—it varies.

Supposing there was ten million gallons a day taken by defendants out of Baldwin, the proportion of that ten million gallons which is available for either of plaintiffs' use is approximately 95 per cent. I include in the 95 per cent. the quantity that goes through the McMullan dam, but this is not wasted, it is used. I do not consider this part of the 95 per cent. as loss, but as part that is available in filling the contracts of the company which they have made to supply water. The five per cent. loss which I allow I obtained from observation of evaporation and observations of the flow of streams in this and in other localities. The distance from St. Anthony falls, the location of plaintiffs' works, to the mouth of Rice creek is eight miles, and from the mouth of Rice creek to the outlet of Baldwin about ten miles by the stream, so this water flows about eighteen miles. The average width of the Mississippi river between the mouth of Rice creek and the St. Anthony falls is about 600 feet. The average velocity is about $1\frac{1}{2}$ feet per second, but the average velocity over the surface little more than that probably.

Q. Now can you compute how much ten million gallons a day

would raise the Mississippi river if poured in at the outlet of Rice creek?

Plaintiffs object on the ground that it is immaterial and irrelevant; objection overruled, with exception to plaintiffs.

A. Well, as an off hand estimate possibly somewhere about an inch. It would be much less than that in the St. Anthony pond. Ten million gallons dumped into the Mississippi every 24 hours would probably not be more than one-sixtieth of an inch on the surface of St. Anthony pond in 24 hours. It would be inappreciable to the eye.

Q. Do you know anything about how much this wastage amounts to on Sundays during the year?

Objected to by plaintiffs as immaterial and irrelevant; objection overruled, with exception to plaintiffs.

A. Probably not more than one-tenth.

Q. How much water does the city of Minneapolis use in its water works out of this dam?

Objected to by plaintiffs as irrelevant and immaterial; objection overruled, with exception to plaintiffs.

A. An average of ten million gallons a day perhaps.

Part of this they have purchased for power and part of it they lease. There are times in the year when they pumped as many as fifteen million gallons a day. If the water is taken out of Lake Baldwin at the rate of five million gallons a day, it would be about two weeks before the Mississippi river would in fact be deprived of five million gallons a day, that is after the commencement of the pumping. These mills that use the water have leases of so many mill-powers. I do not think I had occasion to shut off these mill-powers on the St. Anthony Falls Water Power Company side in 1891. There was no occasion for me to do that under the leases. It does not follow that I could supply all the leases we had during the years 1890 and 1891. There was a shortage of water frequently because there was water going through the sluice. I made no money deduction to the lessees for lack of water. And we did not lose anything on account of shortage of water during those years in any money consideration.

Redirect examination:

When I speak of not shutting off water from the regular leaseholders I mean the tenants who were leasing water from the St. Anthony Falls Water Power Company and when they were short of water on the St. Anthony Falls water-power side I did not make any cash reduction to these leaseholders, but besides these there were contracts by the St. Anthony Falls Water Power Company for the supply of water at so much per day, according to the amount supplied, in terms of horse-power; and in dry seasons when the water was not flowing over the dam we were not

able to supply the full amount required by these contracts. For the time that a regular lessee was not supplied with water he would be charged for the water, but we made it up to him in another way. During the time the water was not flowing over the dam in these years we were not able all the time to supply the demands we had for water. We had demands for water at the regular market rates which we did not have water to supply. When I said we made no cash reductions, I meant that we permitted the parties to use more water than their leases called for when we could supply it. These statements apply to the St. Anthony Falls Water Power Company only. The seasons of the year when we had demands for water on the St. Anthony Falls Water Power Company side at the regular water rates that we were not able to supply, were when the water was not flowing over the dam.

Referring to the question as to the time it would take to show a diminution at St. Anthony falls by pumping water out of Lake Baldwin, when they were pumping regularly, as it appears from the printed table, it would be from 24 to 48 hours. I have made a computation from the figures in evidence showing the amount and the times when water was pumped from Lake Baldwin in 1890, which will show the amount in million gallons which this water power of plaintiffs was deprived of, during the months when the water was not flowing over the dam. This was made on the basis of the defendant's printed reports in evidence as to quantities. In the year 1890 the water power of plaintiffs was deprived between July 7th and December 31st—the times when water was not running over the dam—of 1,044,000,000 gallons. I have
49 taken into consideration and allowed for loss between Lake Baldwin and the water power at Minneapolis and the time it would take for such pumping to show its results on the falls here. They were pumping in June the same as they were in July, so that in my opinion as an engineer, the result was immediate. And it would not change the result of my computation if it took four weeks instead of two weeks to show the full result down here, because they had been pumping from May to July at substantially the same rate and in that case it can be taken as though the result was immediate.

I have made the same computation for 1891 with the same allowances and on the same principle. From January 1 to April 1 and from June 4 to December 31, 1891, the amount plaintiffs' power was deprived of is 1,561,000,000 gallons. The same reasons exist in this year for assuming the diminution to be immediate as they do in 1890, as the water was pumped in May at about the same rate, nearly the same average per day before the water stopped flowing over the dam as after; and therefore as an engineer I would say that it is fair to assume that the effect is immediate. There were parts of March and parts of November, 1892, when the water was not flowing over the dam. When I said that the effect of putting 10,000,000 gallons a day into the Mississippi river where Rice creek flows into it, would be inappreciable, I meant the effect on the height and width of the river would be very slight; my answer did not

refer to the result on the power. The wastage which I spoke of is caused by the effect of the ice on the dams during winter and during floods, and is more temporary. That wastage would not be either more or less in case ten million gallons was added or taken from the stream. If ten million gallons were added to the Mississippi river at Rice creek, or anywhere between there and the power here, the wastage would not be appreciably increased in consequence of putting in the ten million gallons.

50 These dams of plaintiffs are good dams and the St. Anthony Falls Water Power Company's dams being new are exceptionally good at the present time.

Referring to Exhibit "H," the land on which the water after being used in the Pillsbury "A" mill and by the Herzog Manufacturing Company, and by others on the east side, is returned to the river is land owned by the St. Anthony Falls Water Power Company, in each case. It is taken out on the company's property and returned on its property. The rentals that I spoke of as made by the St. Anthony Falls Water Power Company from 1890 to 1892 are rentals of the use of water for power from the St. Anthony Falls Water Power Company's pond, which is reckoned not by the applied power but by the theoretical power; and is computed by taking the weight of the product of the water falling through a given head for a given time, and that divided by the number of horse-power for the given time. The head is obtained by taking the distance from the surface of the water in the pond to the surface of the water on the under side of the wheel. The leases that were leased at less rate than \$1,500.00 per mill-power per year on the east side were leases made in 1878 I think, it was before I came here. For the last six years I do not know of any water being leased on the east side at the rate of \$1,000 per mill-power. The rates that they have been leased during that time were made at \$20 per horse-power, which is \$1,500 per mill-power per year, or \$5 per mill-power a day, and this is the same rate that I computed 1,000,000 gallons of water to be worth 80 cents. When I reckoned nine millions gallons a day under a 49-foot head to make a mill-power I meant a 24-hour day; when I was giving my market value, I was reckoning it at a 24-hour day; but if the same quantity was used in a 16-hour day, the rate of work might be increased 50 per cent.

This 150 cubic feet per second used by the saw-mill company was purchased of the St. Anthony Falls Water Power Company.
51 A part of it thus bought and the price was paid. For that price the St. Anthony Falls Water Power Company has to supply it continuously and maintain the dam for the purpose of supplying it. Two thirds of the 150 cubic feet is supplied in this way; the other 50 cubic feet is supplied by lease, at the rate of \$20 per horse-power per year. It was leased to the lumber company just the same as the water power company would lease water power to anybody else, at an annual rental. During the period when the dams at St. Anthony falls were overflowing, the taking of water from above, out of Rice creek, would have an effect on the power at St. Anthony falls; the head in the pond is increased. The head

for computing power furnished is reckoned from the surface of the pond.

The time when the case of Brooks and Byerly against defendant in this case was tried was between the 15th and 28th day of May, 1892.

Recross-examination :

From measurements which I made in Rice creek a year ago, I found that there was 168 cubic feet a second running above low-water mark and when the stream was rising. This would be 108,000,000 gallons a day in 24 hours.

(Exhibits which were used are here introduced in evidence.)

WILLIAM DE LA BARRE, a witness sworn on behalf of plaintiffs, testified as follows: I reside in Minneapolis and have for fourteen years. Am an engineer and am agent and treasurer for the Minneapolis Mill Company and the St. Anthony Falls Water Power Company. I have made a specialty of hydraulic engineering for fifteen years. I have had charge of the Minneapolis Mill Company's affairs since 1882 and with the St. Anthony Falls Water Power Company management since February 1890. I have had charge of the affairs of the plaintiff companies, leasing water power, selling its real estate, the measurement of water power and the improvements, in
52 fact all matters connected with the management of its affairs, collecting rents, the payment of bills and everything of that sort. The work which I have done as hydraulic engineer during the last fourteen years on the falls and river at St. Anthony falls have been the reconstruction, rebuilding and improvement of all of the hydraulic appurtenances on this side of the river to a large extent. For instance, we deepened the canal, put up new gates and sluice-houses, deepened the tail race and thereby increased the head from thirty-five to fifty feet. This was on the west side, and was done from 1885 up to 1890. I have also built a new stone dam on the east side. The head under which water is used on the west side has been since the beginning of 1890 fifty feet. I have been around St. Anthony falls every day from early morn till late at night, and I have made all observations possible as to the hight of water, the water wastage, in fact everything connected with the running and operating of water power, and I have made soundings as to the river and to determine the character of the bed of the river. I have also been well acquainted with the affairs and works of the St. Anthony Falls Water Power Company. These observations have extended over fourteen years, since 1882. My knowledge of these facts has existed since 1885. I saw Rice creek in 1889, before defendant commenced pumping. I saw Rice creek only once. Its banks are well defined, running through meadow land with a very fair quantity of water in it.

Referring to Exhibit "H," I can point out the property which is owned by the plaintiffs in this case. Taking the east side of the river first, the St. Anthony Falls Water Power Company owns the

flowage rights of the east shore of the river and the Nicollet Island shore from the head of Nicollet island down to below Second avenue southeast, and continuing along on the easterly shore of the Mississippi river to a point on the center line of Eleventh avenue southeast, following down the river. Then we own the land and premises known as Auditor's subdivision No. 44, Minneapolis, lot 17, lot 16, lot 14, lot 15, lot 18, lot 19, lots 20 and 23, also Spirit island, which is lot 22. Lot 23 is the same as Government lot 5, and is called Hennepin island. This land which we own, and which I have named on the east side, is indicated on Exhibit "H" by yellow cross-lines, and the shore rights which I have named are indicated by red ink. Our ownership includes all of the shore of Hennepin island, and we have the right to flow and reflow between low-water and high-water mark on both sides of the whole of Nicollet island.

Now, coming to the west side, the Minneapolis Mill Company owns the right of flowage from the point about 150 feet above the steel-arch bridge and Hennepin avenue and extending along down the westerly shore of the Mississippi river to the section line which conforms with about the center line of Cedar avenue extended toward the river, which is about opposite 8th avenue southeast. We own a strip of land between 3rd and 4th avenue south on 1st street, on the northerly side of 1st street, which does not join the river. We own all the land now occupied by the canal and between the rear side of the flour mills as now situated and the channel, the main tail race of the Minneapolis Mill Company; then we own the Minneapolis Mill Company's platform so called and marked on Exhibit "H," which is situated northerly of 6th avenue south, extended toward the river. Then we own a strip of land known as Upton's island, extending from 6th avenue to about 10th avenue, which is in the river. This tail race on Exhibit "H" is an artificial tail race. It was originally an island. Then we own a strip of land along the river between 10th avenue south extended and 15th avenue south to the section line; also a strip of land running along the river from 10th avenue running along the line of the Minneapolis Mill Company's new tail race through to 5th avenue south. This strip of land borders on the river and is colored yellow on this Exhibit "H," the land that is owned by us is marked by colored yellow lines. The Minneapolis Mill Company owns the lands on which the mill company's canal is situated, running back of these mills; and it also owns the land between those mills and the river from 5th avenue south down to 10th avenue. The mill Co. originally owned everything north of 2d street, and from time to time it sold these valuable mill sites colored brown on this exhibit. But none of these mill sites border on the river. The Minneapolis Mill Company owns the land between the mill properties and the river. All of these properties on the west side of the river, including the flowage rights that I have mentioned, are owned by the Minneapolis Mill Company, and those on the east side, including Hennepin island, are owned by the St. Anthony Falls Water Power Company. The Minneapolis Mill Com-

pany owns the land where the dam touches the shore on the west side. Where this Minneapolis Mill Company's platform is, they consist of a stone dam with a large piece of land, covered by structures making saw mill sites, which are owned by the Minneapolis Mill Company.

During the years 1890, 1891 and 1892 the Minneapolis Mill Company was in actual possession of all this property and these rights that I have mentioned as owned and held by the Minneapolis Mill Company on the west side, and that company was, during that time, holding under these property rights that they claimed there. On the east side the St. Anthony Falls Water Power Company was, during the years 1890, 1891 and 1892, in possession and claiming title to all these rights and property that I have mentioned as belonging to the St. Anthony Falls Water Power Company. Both these plaintiffs were in the same ownership and possession during the years 1891 and 1892, that I have stated they are now in and they had been in such ownership and possession, to my own knowledge, since 1880.

These plaintiffs have placed and maintain at this point of the river a dam, commencing in the center or main channel of the west side of the river, about opposite 3rd avenue south and following down toward the easterly shore of the Mississippi river to a stone dam extending out about 210 feet from below 2d avenue southeast; then on the west shore from the first-mentioned point in the center line of the west channel down toward the stone dam, extending from the west shore of the river at a point between 6th and 5th avenue south on said shore. These dams are indicated on Exhibit "H" and are marked on yellow. The point of the dam is at the center of the west channel and a little below what is marked on Exhibit "H" "as the head of the ledge." The other improvements consist of tail races, head gates, and on the Minneapolis-mill side, a canal 750 feet long. This canal is 100 feet at its opening and 50 feet wide at its end. There is a smaller-sized canal running toward the Pillsbury mill on the east side, and there are two tunnels running under the mill company's platform. This dam that I have described as running down the river on the west side is connected with the shore by a stone dam which is parallel to 6th avenue south.

On the east side we own the stone dam running across from the wing dam, and meeting the wing dam at a point opposite below Second avenue southeast; also, we own a canal running from the center line of Second avenue southeast along Main street to the Pillsbury "A" mill, and gate-houses and other appurtenances. On the east side, at the property of the St. Anthony Falls Water Power Company, the water is supplied by taking it through gates into the canal, and then it is let on to the wheels placed at the mill and from there it is discharged through subterranean tunnels under the lands of the St. Anthony Falls Water Power Company, and is returned to the river in each instance on the east side on the lands of the St. Anthony Falls Water Power Company abutting on the river. On the west side the water is supplied to the mills through a canal

into the mills, which are located on each side of the canal, and is discharged under and through the lands of the Minneapolis Mill Company into the main tail race, and from there into the river. The tail races of the Minneapolis Mill Company are not marked on this map, but they lie almost at right angles with the main tail race running from these mills into the main tail race, and all of the water supplied on the west side returns to the river on the property of the Minneapolis Mill Company.

All these improvements which I have mentioned were made by and on behalf of the plaintiff companies to furnish water to the different lessees or consumers. The head of the fall is at the head of the dam at a point marked "A" on Exhibit "H." The tail water is at the foot of the apron marked "B." From points "A" to "B" we have a fall of 57 feet. Of this the fall now utilized is about 50 feet; and we still have below the point marked "B" on the line of our property another fall of 20 feet, which is not at present utilized. The effect of the maintenance of these dams that I have described is to collect the water and retain the water from flowing over and to turn it into the respective canals and mills, and it creates on the property of these plaintiffs a water power, and in each case, the St. Anthony Falls Water Power Company and the Minneapolis Mill Company, this power is used for driving flour mills and other manufacturing establishments. The special use it is put to by these plaintiffs is that we lease and sell the power. We simply lease the right to draw water. We lease the use of the water. The power that exists at this fall could be utilized only to a very insignificant extent without these improvements. The fall without these improvements would only be twelve feet. The plaintiffs use this water and lease it for profit; it is a business venture like any other. I have heard the testimony of Mr. Fanning and have seen the figures put in evidence in regard to the amount of water pumped by defendant from Lake Baldwin in 1890, 1891 and 1892, and know the situation of Lake Baldwin. The distance from Lake Baldwin to the Mississippi river is about ten miles by the course of the river, and from where Rice creek flows into the Mississippi river to the water power of plaintiffs it is about eight miles. As a hydraulic engineer I am able to give an opinion as to the amount of diminution that would be caused to the water in Mississippi river at the power of plaintiffs by taking out at the outlet of Lake Baldwin a certain quantity, for instance a million gallons a day. We get nearly all the water at the falls that they have up there. The percentage of diminution in coming down I do not think would go over five or six or seven per cent. That would be the outside. It would vary at different seasons of the year. The effect on the power of plaintiffs caused by taking out, for instance, a million gallons a day at Lake Baldwin would certainly be to diminish the power at the falls here. The diminution would be to the extent of that million gallons, less the five or seven per cent.; and if that quantity of one million gallons per day were increased from one million to ten and a half million per day, the diminution of the power at the falls here would increase in proportion.

In leasing power and in the use of power here at St. Anthony falls we use a 16-hour day. At a 16-hour day, in order to make at the power of the plaintiffs one mill-power, it would require five million six hundred and sixteen gallons a day. This is at a 50-foot head. This quantity would sustain a mill-power for 16 hours, or 75 horse-power. I know the market value of water power as it was during the years 1890, 1891 and 1892 in this vicinity, and particularly at St. Anthony falls. The unit is a mill-power, and the value during those years was \$1,500 per mill-power per year. It was worth this for a 16-hour day. That is \$20 per horse-power per year or \$5 per mill-power per day. A million gallons at these falls is equivalent to about one-sixth of a mill-power. I have computed what a million gallons are worth at the rates I have stated. It is worth 80 cents for every million gallons at these falls, which is the same as \$1,500 a year for mill-power.

58 If the volume of water at St. Anthony falls here was diminished from five to ten million gallons per day the effect would be that the power here would be depreciated, and according to the quantity taken it would depreciate from one to two mill-powers. If it was a little over five million gallons a day it would depreciate one mill-power. If it was ten million gallons a day, it would be two mill-powers. Taking the ordinary stage of water in the river and in the pond here, if a mill-power is drawn off when the pond is at the ordinary stage, the effect would be to lower the pond and lower the power, and the addition of a flow of water so that we could get an extra mill-power would be to raise the pond and raise the power. The sudden flowing in of that amount of water would be to raise the pond and as the pond raises it would have the following effect. We take the waters to the mills through canals to the right and to the left of the main canal to the different water wheels situated at these different mills. Now every one of these water wheels has an automatic governor attached to it, a device by which the water is put on or taken off these water wheels. Now, as the amount of water increases in the pond, or the head increases, all the governors of at least 28 or 30 mills go to work and shut off the water, less water is used in all the mills; the water is shut off automatically as the head is raised. Now it works exactly the opposite way whenever the water decreases. The automatic governors put on more water, and the lower the water goes the more water it requires until they get to the full capacity of the water wheels and then the water is simply spouted through without giving any effect. The purpose is simply this, that the increase in the power is more than the proportionate increase in the amount of water.

I am able to state during what months in the years 1890, 1891 and 1892 the water was flowing over the dam here at the falls. In 1890 there was no water wasted from January 1st to April 59 1st and from July 7th to December 31st, nine months lacking seven days. In 1891 there was no wastage from January 1st to April 1st and from June 4th to December 31st, ten months lacking four days. These are the same dates testified to by Mr. Fanning. In 1892 there was no wastage from January 1st to March

28th and from November 15th to December 31st, making four and a half months lacking four days. During the months of these years when the water was not flowing over the dam, the Minneapolis Mill Company was not able to supply its customers with the water demanded. It did not have water enough to supply the demands made upon it. We had applications for more water than we could furnish. During these years the water of the Minneapolis Mill Company has been leased by permanent leases and surplus leases. That is to say, a permanent lease is a lease granted ever since the foundation of the company from 1856; from time to time we make leases permanent; thus leases run forever and the pay on the lease is so much per year. Then it may be payable whether they use the water or not. Besides these permanent leases there are other leases. In these years when we had water for our customers which they did not use, they paid just the same and when we did not have water to furnish them, we deducted so much from the annual lease. Whenever there was a shortage in the supply of water we rebated it *pro rata*; did not collect any pay.

Q. And if you had the water what would you have done?

Objected to by defendant as incompetent and immaterial; which objection is sustained, with exception to plaintiffs.

— During these years 1890, 1891 and 1892 when the water was not flowing over the dam we had a demand for water besides what we furnished to regular lessees, a demand which we could not supply.

Q. Was that demand made at the regular market rates?

60 Objected to by defendant as incompetent and immaterial; which objection was sustained, with exception to plaintiffs.

These demands were by mill-owners who came and wanted to engage additional powers. At times of low water millers came in frequently and asked to be allowed to use more water and pay for it additionally at an additional rate. During the whole period when the water was not flowing over the dam these demands were constant. We did not have water to supply all these demands. We had a regular charge which we made for such surplus water, and that charge was \$5.00 for a mill-power for a day of 16 hours. We made rebates to our regular lessees when we could not furnish them water, the amount of which rebates I can give for the years 1890, 1891 and 1892. These are rebates made during the periods when the water was not flowing over the dam. These refer to the Minneapolis Mill Company. From January 1st to April 1st in 1892, rebates were made to the mills leasing water from the Minneapolis Mill Company on the west side of the Mississippi river, on account of the shortage of water, to the amount of \$13,026.88. In the last quarter of 1892, from October 1st to December 31st, the rebates were \$7,371.51. There were no rebates in the second and third quarter. In 1891 the rebates of the first quarter were \$13,718.58, and in the last quarter they were \$8,399.39. In 1890 rebates in the last quarter were \$3,680.17. There were no rebates in these other

quarters in 1891 and 1892, because we had water to furnish our regular lessees. These rebates were only to the regular lessees, those lessees that have permanent leases. The others we were not under obligation to furnish water to; but to the regular lessees we are under obligation to furnish water if there is any; during all these times at the periods when we gave rebates and when we did not

61 give rebates, we were having these demands for water that we could not furnish, demands at the \$5.00 a day rate. Prior to the last quarter of 1890 rebates were not given, but this was not because we had water to furnish them; the practice previous to that time was that the lessees pay their regular rent, water or no water, but they were using more or less in excess, and we let them use it without charging for it, so that we considered it a kind of offset, by mutual agreement. We gave them surplus instead of making rebates; and by this the quantity of water that we had to furnish outside of our regular lessees was lessened.

From February 1st, 1890 during the years 1890, 1891 and 1892, I had knowledge of the affairs on the east side—the St. Anthony Falls Water Power Company side—as to the condition of affairs there, the supply and demand, etc. We had demands there to supply water at those times when the water was not running over the dam which we were not able to supply. The rates for water were the same on that side as on the Minneapolis Mill Company side. The character of the demands, their constancy and continuity were about the same on the east side as on the west side during the whole period since I have had charge of it. I was unable to supply those demands when the water was not flowing over the dam.

Cross-examination:

The tail races on both sides of the river are artificial. The Minneapolis Mill Company's new tail race is cut into the river bed and is artificial. Our companies do not own any land above the point marked in yellow bars on Exhibit "H." Above that all we have is flowage rights, a right to back up water. This is true of both sides. This piece of land on Exhibit "H," opposite Second avenue southeast, on each side of the head race running to the Pillsbury "A" mill, colored red, but crossed lined in yellow ink on each side, is owned by the St. Anthony Falls Water Power Company, and above that point we own simply the rights we have purchased to flow from low-water to high-water mark and the condition of affairs

62 is the same on the westerly bank above a point nearly opposite Fifth avenue south. We could not maintain the water in this mill pond up to the top of our dam without setting the water back on this where we have obtained flowage rights. Originally the plaintiff companies owned the lands on both sides of the river above where they now own, but they have sold from time to time land to different parties at different times, which it did not need, and have reserved the flowage rights.

In my judgment, the average daily flow of the Mississippi river past the lands of plaintiffs in these actions, during the year, is about

3,500 cubic feet per second, that would be 26,250 gallons per second, which would be 2,268,000,000 gallons for a day of 24 hours. The rebates which I testified to were given mostly in the last months of the last quarter and the first months of the first quarter. The rebates occurred by reason of a shortage of water. The heaviest rebates were in January and February, during the very cold part of the winter. There were no rebates at all during the summer months in these years, except as I have stated. Mr. Fanning is right when he said the loss at one time was made up to the mill-owner by giving him more water. We occasionally do that; if there is shortage for a day or two in summer we make it up. We do not know what time a mill will start up and demand water after it has been shut down. During the months that I have stated for these years, except December, January and February, we have had all the water we needed to supply these leases, except such a time as we would give them a surplus when we had it. In 1891 the two plaintiff companies entered into an agreement to make these rebate rules, agreeing from that time on to charge these mill-owners for extra water and pay them rebates when they could not supply water. This was also done by mutual agreement with the mill-owners. They were notified of the fact and assented to it.

63 Our losses for water during those years was for a much larger amount of water than we were able to supply, because the years were unusually dry. We had a cycle of dry years, and had less water those years than we ordinarily had. Those years were very much drier than any other years in my experience except 1892 when the rain set in. The early part of 1892, 1889, 1890 and 1891 were considerably drier than I have ever known in my experience, and we suffered more from loss of water in those years than we have in my whole experience, and my experience extends over eleven years.

Q. Mr. De la Barre, what other waste is there in this dam beside the waste when they are overflowing at the top?

To which question plaintiffs objected on the ground that it was immaterial and irrelevant; which objection was overruled, with exception to plaintiffs.

A. In the ordinary management of the water power in supplying these mills with a quantity of water, we have to sustain a certain amount of wastage in the shutting down of mills. It is impossible for the mills to shut down without wasting more or less water. Now, I would like to exclude that, because that is a temporary waste entirely.

Q. Well, at times when this water is just low enough when it happens to run over the dam, what wastage is there out of this dam?

To which question plaintiffs object as incompetent, irrelevant and immaterial; which objection was overruled, with exception to plaintiffs.

A. There is some leakage through the dam, and what water is

used for sluicing purposes. How much there is of this leakage I do not know and cannot estimate. It varies with the seasons, whether there is a large head of water, ice in the pond, or cold or warm season. I would not call it a large amount. Of course, there are lots of little streams in large planks of that kind, the thickness of a finger; of course, that is practically wastage. There are other streams the thickness of your arm; of course that is wastage; 64 and it is almost impossible for a man to collect them together and make an estimate. I think it amounts to ten million gallons a day, and probably more at times.

Q. Now is it not a fact that in the angle of a dam below the mill pond that there is not always a sheet of water that is running down that is all waste running down and escaping in the river below?

Objected to by plaintiffs as immaterial and irrelevant; which objection was overruled, with exception to plaintiffs.

A. Yes sir, that is so here (indicating below the angle of the dam); but that is necessary for the protection of the apron. You have got to keep that apron from time to time wet. The water comes through the dam, we let that water through on purpose to keep the apron wet; there are weeks and weeks when the apron is very dry. There is a waste-gate to get the water out of the canal which is used to empty the water out of the canal whenever we have to draw it out. This happens about twenty times a year on Sundays. In the years 1890, 1891 and 1892 about thirty millions of logs have been sluiced through the dam. This requires the sluice to be opened about twelve times in a season for each of these summers, from the 1st of May until the 1st of October and usually Sundays. We always open it at any time upon the request of the boom company. Every Sunday the dam runs over, it has got to, there is no place to store the water when the mills are not drawing. Our habit is to keep the water at the height of the dam when we are running the mills, and it takes about four minutes for the water to get above the dam when we shut off the mills; but when we calculate on a 16-hour day for the flowage of this water, the water is not running over the top of the dam the other eight hours. We divide the day and we divide the time.

The mill-owners under their leases have the right to use any portion of their twenty-four hours, and that is my business to divide it up. The mills shut down at six o'clock Sunday 65 morning and start at six o'clock Monday morning. Some of our leases are for a twenty-four hour and some are for a sixteen-hour day. We have permanent leases and surplus leases. Now all the permanent leases range from \$100 up; these were leased a great many years ago; \$100 per mill-power for a year. We have one or two at that price. The other permanent leases range up to \$1,000 a year. When we take off a rebate, it comes off from a high-priced power, because the latest leases are first shut off, first rebated. We have no permanent leases at more than \$1,000 a year, so that the rebate for the mill-power that we lease at a per-

manent lease is at the rate of \$1,000 on a mill-power. You could not buy any for that now. We have them for sale. There are 240 mill-powers leased on both sides of the river.

The average total capacity of our stream as I figure it, up here, is 2,268,000,000 gallons, and that is about 360 mill-powers, so there is 120 mill-powers that the river could supply that we have not leased. The St. Anthony Falls Water Power Company has a right to use whatever water belongs to its flowage. I do not know of any arrangement between these companies by which one company has the privilege as against the other company to use a certain number of mill-powers. I am agent for both companies and I accommodate one and the other as nearly as I can. I could not arrange that one company use it a part of the time and the other a part of the time, because it does not suit the convenience of the different parties. So far as I can, I arrange them so that it will not conflict and draw down a large portion of the water on one side and a large portion on the other. So far as the flowage of the water into the different canals is concerned as it passes down by the St. Anthony Water Power Company's works and the Minneapolis Mill Company's works, it depends largely upon the orders which I give, in relation to the gates, the dams and the sluices. I cannot divert the stream that comes into the river when the pond is full from

66 one side to the other, because water always finds its level, and if I could do it, I would have to shut off one side and open the other. I could not do that because I would be interfering with owners that would have a right to have the water. It is under my supervision, but I only have the right to deprive the parties of water except to repair.

Q. Is it not a fact, and has it not been so for the last few years, that a larger proportion of the river is running down through the Minneapolis Mill Company's works than through any other; sometimes flowing that way and sometimes another?

Objected to by plaintiffs as irrelevant and immaterial; which objection was overruled, with exception to plaintiffs.

A. We use more water on the Minneapolis Mill Company's side; we use a larger portion there. When the mills are running there is not a larger amount of water flowing down on the St. Anthony Falls Water Power Company's side than there is on the Minneapolis Mill Company's side, because there is a heavier draft on the westerly side than on the easterly side. The direction the water takes coming down the Mississippi river depends on which side it goes, east or west side of the river, according to the number of mills running and the draught. I cannot tell what proportion of the stream is going on the St. Anthony Falls Water Power Company's side or the Minneapolis Mill Company's side, except what is going to be drawn through the wheels, and that is something no one can do; I cannot tell that; and the amount that is fed to these respective mills and wheels is governed by an automatic device which raises or falls with the surface of the river; and by putting the dam there, we have raised the surface of the water to the top of the dam and we

maintain it at that point, and after it has been raised to that point the whole amount of water which comes down the Mississippi river is flowing away either through our canals or over the top of our dam.

Ten million gallons a day flowing on the Mississippi river
67 would not affect the head to any considerable extent, but it would affect the volume. I would take for granted that Mr. Fanning's statement, that it would not raise the head over $\frac{1}{80}$ or $\frac{1}{60}$ of an inch, would be right. Five million six hundred and sixteen thousand gallons a day falling fifty feet would sustain a mill-power for sixteen hours. This is not so many gallons applied with available force to the wheel, but is the amount of water. Now, understand, we only lease the right to draw water, and we do not sell power or guarantee the power. We measure the water after it is used and let them get all the power out of it they can. We measure by the weir which is placed below the wheel, and our company sustains all the loss which occurs between the time it enters the dam and the time it passes the weir. I cannot tell how much available power would be got out of 5,000,616 gallons.

Referring to the logging company's dam on the east side, that is not the logging company's, it is the saw-mill company's. They have the right, together with the power they use for propelling their machinery, to use a quantity of water to sluice their sawdust and refuse, I think ten cubic feet per second; and they have five mill-powers to propel their machinery. The dam is the St. Anthony Falls Water Power Company's dam, and when the old dam had become useless and old they were to replace it by a stone dam. The quantity used by the saw-mill company is 100 cubic feet per second. That would be in the neighborhood of forty million gallons per day. They have ten cubic feet per second for sluicing purposes; that includes everything. The city water works are entitled, on the west side, to six mill-powers and on the east side to three mill-powers. They are paying \$1,000 a year for four of them and they own the rest of them, three on the east side and two on the west side. The water is measured for the saw-mills the same as the others, by the weir located in the tail race below, from five to thirty feet below

68 their wheels. The whole of the water of these plaintiff companies is used in the way of leasing power. It is not applied by themselves for any purposes, except to sell the power for other purposes. The time when we have suffered ordinarily from a shortage of water is in these winter months, the same as during the past three years. I cannot tell how far out from the westerly bank of the river where the bank existed before our improvements was the low-water mark of the river; the dams existed for twenty years before I came here and I cannot tell anything about it. I have no means of telling how wide that stream between Upton's island and the main bank was in its natural condition. These mill sites on what is marked Exhibit "H" as the company's canal are owned by the respective owners of the mills, and not by either one of these plaintiffs. They own the land on which the mill stands in fee simple, just the size of the mill property. The water is drawn from the canal into the mill direct and applied, and is discharged

through the Minneapolis Mill Company's property. It is applied on the land of the mill-owners, to their wheels. Their deeds all contain a clause that the water shall go onto the premises of the mill-owners and through the water power company's land, and also out of it. We lowered some of the tail races two years ago, in the spring of 1890. The quantity of water which we let out of our dams to keep the apron wet is not appreciable. In very hot weather it gets dry in one day, and about the middle of the week we wet it down a little. These logs have not always been running down this river. There was a period of five years nearly all the logs that were floated down were sawed at the mills. They always float logs up to the dam, but not over it, in case they want to use them above. At the point on Exhibit "H" where the course of the ledge is marked, in a low stage of water that ledge nearly comes to the surface. The river averages 600 feet wide from the dam up to the mouth of Rice creek.

69 Redirect examination :

Of this water used by the city three mill-powers are used on the east side and six mill-powers are used on the west side. These mill-powers on the east side of the river, the St. Anthony Falls Water Company's side, were obtained by the city by a compromise agreement between the St. Anthony Falls Water Power Company and the city. A contract was made whereby the city should be entitled to use at their pumping station three mill-powers of water for the pumping of water, by pumping machinery, provided it would make arrangements to take the water from our high-level canal. They are entitled to use these three powers for power alone. There is nothing in the agreement as to water besides. On the west side it owns two mill-powers free of rent; they were given to the city by the Minneapolis Mill Company, together with a lot of land, in consideration of the city appropriating a certain sum of money for the repair of the apron at the time it was destroyed. These two mill-powers were bought by the city; the other four mill-powers were rented at \$1,000 a year. These powers bought by the city were to be supplied by water from the dam the same as the other four; and these were leased to the city the same as you would to a flouring mill or any other power. These 100 cubic feet used by the saw-mill, and the ten cubic feet used for sluicing purposes, are held through grants by the St. Anthony Falls Water Power Company in 1871, and are for water to be supplied by the water power company from their dam.

In regard to what Mr. Chamberlain called the wastage between the five million gallons, enough to produce a mill-power, going into the canal and coming out below the wheel, they would be very small. I would not know how to get at that. This wastage is simply through very fine creases in the stone-work. It trickles out in drops here and there and is collected in small pipes and
70 sewers and is carried into the tail race. The measurement taken at the tail race would practically give the amount of water that comes out of the dam.

Under circumstances when the regular leases were being supplied, and also surplus water was being supplied under surplus leases, and there was a diminution in the water so that we have to make a cut-off, we would cut off the surplus leases first. The first cut-off would be of the amounts taken above the permanent leases if there was a regular consumption outside of the regular les-ees, we would cut that off first, so our first loss from the lack of water is by cutting off those who pay the most. These 240 mill-powers that I said were leased are all permanent leases; they run forever. These are the permanent leases that I have been talking about. These do not include any surplus sale, or sale to any new consumer. In case only our regular leases, using the 240 mill-powers, were using the water, and the water was kept down so it was not running over the dam, that would indicate that there was less than 3,500 cubic feet flowing in the river, between 800 and 1,000 cubic feet a second less, indicating from 2,500 to 2,700 cubic feet flowing.

The leakage in the dam is by reason of a number of causes, the action of the ice, etc., and is prevented by replanking and repairing every year. After the ice goes out the leakage will stop itself. The leakage would not be any more or less in case ten million gallons were taken out of the flow or added to it. The condition of those dams as they were maintained in the years 1890, 1891 and 1892, was fairly good, and there was no more leakage there than is consistent with works of this sort that are fairly well built. I don't know of a dam where there is no leakage. This sluicing of logs that I spoke of is made twelve times in each year, and is usually done on Sundays, and is generally done in high water. No sluicing is done when the water is so low that it is not flowing over the

71 dam. The sluicing is done exclusively at a season of the year when the water is flowing over the dam. It is impossible to do it at any other season. The extreme lowest flow of the Mississippi river here is less than 1,500 cubic feet per second. I have estimated it at 1,200 cubic feet per second, and allowed for every contingency. This was some time in February; I think the second week in February of the winter of 1891.

Recross-examination :

This was the lowest I ever knew it, and was when everything was frozen solid, and continued for several days. When the flow is 3,500 cubic feet per second, that will supply 360 mill-powers, and the flow when all our mills are running and nothing is running over the dam, would be about 900 cubic feet less per second, and then we would have enough to supply the regular leases. In 1890, 1891 and 1892, we had 240 regular leases on both sides of the river. We had besides that at times, enough more leased so that we had a total of 325 mill-powers. That is the highest that I have any record of. This does not include a number of mill-powers on the east side that we allow the Pillsbury "A" mill to use that we keep no record of at all. We did not charge the Pillsbury "A" for these mill-powers. There were ten to fifteen of them. We gave these to them in way

of an offset. We do not pay them any rebate; we pay them in water power. About one-third of the permanent leases are for 24 hours a day, and they vary in price all the way from \$100 to \$1,000 per year. The rest of the leases are for 16-hour day, at the same prices. There is one mill-power that has been granted since 1863 that pays \$133.33 $\frac{1}{3}$ per year for 16 hours. There are only a few \$100 leases. It is not true that when we cut off any mill-powers, when we have to rebate, that we rebate on the cheapest ones we have got. We only rebate on the mill-powers that are cut off. I endeavor to keep the water to a certain point so it does not run over the dam, and so we will get the full benefit of a full head. As soon as I see there is not enough water to supply all the leases

72 in operation I make a written notice to such a mill that they must shut off their power. From the time that these notices are issued we make a rebate. We cut these mill-powers out according to the date of the lease, the oldest leases remain in force. The newest leases are cut out first. That is the provision of the lease I suppose, under the general law of priority; that is prior rights. Every one of our leases are sold subject to the use of earlier grantees. When we had 325 mill-powers rented it was in high water, in the big flood of 1892 I think, and during high water for a couple of months or more during 1891.

Redirect examination :

The latest leases are the dearest and those are the ones we cut out first. I was speaking of permanent leases. This extra quantity that is used by Pillsbury on the east side is taken in consideration of his not charging a rebate when he is short. He does not make any claim and we do not make any claim. He prefers the water to the money, when we are able to give it to him.

Recross-examination :

This dam is owned by the Minneapolis Mill Company on its side of the river up to the apex of the dam, and from that point down to the works of the St. Anthony Falls Water Power Company is owned by the St. Anthony Falls Water Power Company. The city of Minneapolis does not pay for the water that is pumped through its main. We do not charge them for water used for domestic purposes. When I say do not charge them I mean, they are entitled by the lease to so much water; they take it as any other mill would; I simply measure the water as it comes out and as long as it does not exceed the quantity they are entitled to, we do not say anything. We do not give them water to distribute through the city, and we do not recognize any title in the city except to use the six mill-powers. We do not measure the water that goes through their main. I suppose they measure that themselves.

73 Q. Mr. De la Barre, referring to Plaintiffs' Exhibit "H" and the point of land on the Mississippi river owned by the St. Anthony Falls Water Power Company farthest up the stream, how far is it from that point to a point up the river intersected by

a line drawn at right angles with the stream from the uppermost point of the dam, that is from the head race to the highest point owned by them to the apex of the dam?

Objected to by the plaintiffs as immaterial and irrelevant; objection overruled, with exception to plaintiffs.

A. About 900 feet.

Q. How far is the apex of the dam above the highest point of land owned by the Minneapolis Mill Company bordering on the stream?

Objected to as immaterial and irrelevant; objection overruled, with exception to plaintiffs.

A. 650 feet; so that the point of the dam is 900 feet above any land owned by the St. Anthony Falls Water Power Company and 650 feet above any land owned by the Minneapolis Mill Company on the stream.

Witness further testified: The height of the dam at the apex above the bed of the river is about 5 feet. I do not know exactly the difference between height of the dam opposite this point of land furthest up the stream owned by the Minneapolis Mill Company and the apex of the dam.

(Which last-mentioned testimony was taken under objection of plaintiffs that it was irrelevant and immaterial; which objection was overruled, with exception to plaintiffs.)

This part of the dam that runs up to the apex and the wings are necessary to hold the water back, and has been so for thirty-five years.

Redirect examination:

When I say above land owned by these companies, I mean any parcel or pieces of land to which these companies hold the fee. Opposite the whole of this dam, including the apex, the companies owned the flowage right that I spoke of.

There would be no additional increase in the maintenance of the dam or cost for repairs in operating the dam and works of the plaintiffs, if plaintiffs furnished an additional one, two or three mill-powers in addition to what they do furnish; so that what they would get out of those one, two or three mill-powers would be clear gain. When I gave the market value of a mill-power as \$1,500 per year, I meant a year of 312 days. That is the basis of all our computations. That excludes Sundays and a few legal holidays, which we generally take advantage of in making our repairs.

L. W. RUNDLETTE, a witness sworn on behalf of the plaintiffs, testified as follows: I am city engineer of St. Paul and have been for about ten years, and was exclusively engineer of the water board for two years, when we built the water works. Since 1889, I have been *ex officio* member of the St. Paul water board and have given

advice and assistance to the board. I am acquainted with the water-works system of the city of St. Paul and the manner in which it is obtained, delivered and distributed through the city of St. Paul. The source of supply is the lakes lying north of St. Paul. Our water supply is taken from Lake Vadnais and from Lake Phalan. Lake Phalan is a different basin from Lake Vadnais, but naturally water does not run from Lake Vadnais to Lake Phalan, but this happens only once in a while when there is high water. We have a system of artesian wells near Lake Vadnais which we use when we are short at Vadnais. We have used these wells some during the last three years, except I think we did not use them last year. Water is carried in a conduit from Lake Vadnais to McCarran lake, and from there repumped to the high service and it comes down by gravity and supplies the low service. Lake Phalan supplies about a sixth or a seventh of our water. We use about one-half high and one-half low service, and all that comes from Lake Phalan is used for low service. The only other supply besides Lake Phalan comes from and through Lake Vadnais, which is six-sevenths or five-sixths of the water that is used in St. Paul. This Lake Vadnais is the lake into which water that is pumped from Lake Baldwin by our station comes, it runs into Charles lake and from that into Pleasant lake and from that into Vadnais. In short all of the high service is supplied from Lake Vadnais and some of the low service is supplied from Lake Vadnais, and all that comes from Lake Phalan is used for the low service. There is no difference in use between what we call the low service and what we call the high service, except as to the position. Both are used for general use, domestic purposes. This water is distributed through St. Paul in pipes, various-sized pipes, according to the district to be supplied; there are approximately 214 miles of pipes which extend all through the thickly settled portioned part of the city and in the less thickly settled portioned and in the other parts of the city. The furthest distance that water is carried in St. Paul is at St. Anthony Park, about $4\frac{1}{2}$ miles. This water is furnished simply for domestic consumption, to houses and buildings, and certain fixed rents and charges are collected by the water board for that use. I do not know of any water being used for the purpose of supplying lakes or reservoirs in St. Paul, except last fall we used a small amount to bring Lake Como up to the level, I think we raised it five or six inches. The water is drawn from hydrants and is used for extinguishing fires and for sprinkling the streets. The faucets and outlet pipes through which this water is taken are in manufacturing buildings and in business buildings of all kinds in the city of St. Paul. It is also used in the wholesale houses for the ordinary drinking purposes and domestic purposes. It is not used to run elevators in any business house, so far as I know. The total consumption of the city of St. Paul for the year averaged from May to November, 1892, 7,700,000 gallons per day, of which 1,000,000 came from the Phalan supply and the rest came from the Vadnais system. In 1890 and 1891 it was necessary to

pump into the Vadnais system, in certain seasons at times a larger quantity than 6,000,000 gallons a day, in order that that system might supply during the whole of the year an average of 6 or 7 million gallons a day. My impression is we pumped from Baldwin station in January, 1893. The pumping station is still there, but it is not in order to pump. It is now in charge of a watchman.

JOHN CAULFIELD, sworn on behalf of plaintiffs, testified: I am secretary of The Board of Water Commissioners of St. Paul, the defendant in these actions. I have been secretary of the board since 1882, and secretary of the company I think since 1874. I keep track of the affairs of the company and its management, particularly in collecting rents. We pumped 14 days in January, 1893, and a small amount the latter part. The average was $6\frac{1}{2}$ million gallons a day for the first 14 days in January, 1893—91,000,000 gallons during January. This is all that we have pumped in 1893. In December, 1892, we pumped 296,810,400 gallons. We pumped every day in December, 1892. I know approximately the cost and expense of putting these works at Lake Baldwin. The building cost \$3,500 and the engine and boiler, etc., were \$7,500 or \$8,000. The cost to the city of St. Paul for the lands, the pumping station, and everything connected with it, was about \$25,000. This includes the payments we have made for riparian rights we have condemned on Baldwin lake. This does not include the \$8,000 or \$9,000 that we paid the Fridley owners. I understand we condemned as against the Fridley owners last year and paid about \$11,000, including attorneys' fees and everything. I know about the distribution of water in St. Paul. Mr. Rundlette's testimony is substantially correct. All of this water is supplied at a rental, which rental is collected by the board. The city of St. Paul pays the board the regular rates for hydrant purposes. We have contracts with parties sprinkling the streets, and it is paid through our department. In St. Paul there are a large number of public buildings, office buildings and stores, a great many buildings in which manufacturing is done and machinery is used, dentist shops and laundries, boot and shoe manufactories, buildings that are run by steam boilers, and other manufacturing buildings that are run by steam. We supply water for some of these buildings, and for some of the manufacturing buildings. For instance, we supply the Gotzain Boot and Shoe Company, their store and factory. We have a meter which measures the water used and we charge them for the amount of water they use. They have the use of it in different ways if they want to use it. They have a right to use it to fill their steam boilers and for laundry purposes. The water department gives them the right in these buildings and other buildings to use it for boilers and steam. And there are other manufactories that the water department gives the same right to, for filling steam boilers, which are used for the purpose of running engines for power, all of which are owned by private individuals. We have three moters in the city in churches that are used for running organs. There are no elevators run by water

pressure. Our consumers can use the water for any purpose they want to. We supply water to houses that have pipes and automatic sprinklers, in three instances: the Harvester works, the Cordage works, the Bohn Manufacturing Co., and Noyes Bros. & Cutler. Any customer who will take the water and pay for it, we allow to use it in filling boilers for manufactories, but for running elevators or other power, we have forbidden it and do not allow it, although we have hundreds of applications continually. I am not sure that

78 I consider the present sources of water supply that we have stated here are sufficient for the full use of the city, those which are now open and available, including Lake Baldwin. We supply water to private fountains for ornamental use in two or three instances, outside of the land-sprinklers, and we supply it for the public parks and get rent for it at certain fixed charges collected by the board.

Cross-examination:

We account to the treasurer of the city of St. Paul for all money received, and all money received is turned over to the city of St. Paul, and the money paid by the city is simply to adjust costs so that we can keep track of what they are using and keep account of each respective department. Our engineer and attorney and officers are paid by the city. We are one of the departments of the city of St. Paul.

Q. Now, Mr. Caulfield, would or would not this $\frac{1}{2}$ or $\frac{1}{3}$ that Mr. Rundlette testifies is taken from Lake Phalan be sufficient to cover all of these mechanical uses outside of domestic uses?

Objected to by plaintiffs as irrelevant and immaterial; which objection was overruled, with exception to plaintiffs.

A. I think it would.

Witness further testifies: The water in Lake Phalan does not in any way come from Lake Vadnais or Baldwin except in high water when it runs from Vadnais lake; but in ordinary stages of water there is no connection between these lakes, and the draught on Lake Phalan is separate from the draught on Lake Vadnais. These automatic sprinklers I spoke of are only for emergency purposes to put out fire, but they have not in fact used any water for that purpose that I know of.

Redirect examination:

The water from Lake Phalan supplies a large number of these mechanical purposes, but some of the water that comes from Lake Vadnais supplies some too. The water which is measured by meters amounts to a million gallons a day. We measure the
79 water in all the large establishments and in all the manufacturing establishments by meter. In these manufacturing establishments the engines that are used are stationary engines on the premises and the water is simply used to fill their boilers to

generate steam on the premises. The water is not used for power. The board positively forbids the water to be used for power. This million gallons does not include the public fountains and parks.

Each and every one of the exhibits used by plaintiffs in the testimony are here offered and received in evidence.

Plaintiffs rested.

(Plaintiffs are allowed to amend the complaints in each case by adding allegations that the defendant intends and threatens to continue to pump large quantities of water to the extent of ten million gallons a day, and the usual allegations as to damage to plaintiffs which cannot be compensated in damages, requisite for an injunction.)

Defendant moves that the actions be dismissed on the ground that there is no liability on the part of the defendant to either of the plaintiffs, on the ground that the Mississippi river is a navigable river, its bed and its waters are owned by the State of Minnesota, the board of water commissioners are a part of the city government of the city of St. Paul, authorized by the legislature to draw water from any of the lakes of this State for the purpose of supplying water to the city of St. Paul; they act therefore as agents of the State and in the name of the State, supplying the citizens of the State with water owned by the State, which the State has a right to use for that purpose, which right is paramount to the rights of any riparian owners; also, on the ground that nothing but a reasonable use had been shown by the defendant as riparian owner of land on Lake Baldwin; also, that plaintiffs' dams are a purpresture and they can have no right to the use of water obtained in that way; also, that their riparian rights do not extend to the use of water on land not owned by them, or as against the defendant to power obtained which requires the flowage of land other than their own.

Which motion was argued by both parties, and after considering the arguments, the court granted said motion in each of said causes, and filed therein the decision given below in each case, to which plaintiffs each duly excepted.

Decision.

The above-entitled action came on for trial before said court, at a general term thereof, on the 22d day of May, 1893, before the undersigned judge of said court, and a jury; Benton, Roberts & Brown appeared for plaintiff, and Leon T. Chamberlain for defendant; after the jury was duly empanelled, the defendant withdrew its counter-claim, in which it asked that the rights of the plaintiff, if any it had, be condemned and acquired by defendant; and said counter-claim was dismissed by the court, and thereupon the jury was discharged and the case tried before the court without a jury.

After plaintiff rested, defendant moved that the action be dismissed, on the ground that the evidence introduced by plaintiff established no cause of action against the defendant. And after

hearing the arguments of counsel and duly considering the same, it is—

Ordered, that said motion be, and the same is hereby granted, and said action be, and hereby is dismissed, and plaintiff duly excepted to the same.

Dated this 26th day of May, 1893.

THOMAS CANTY, Judge.

Memoranda.

Two actions were brought and tried together; one by the St. Anthony Falls Water Power Company, and the other by the Minneapolis Mill Company, as plaintiffs. One owned the water power on one side of St. Anthony falls, and the other on the other side.

81 Rice creek empties into the Mississippi river eight miles above St. Anthony falls. It is the outlet of Lake Baldwin, situated in Anoka county, ten miles further to the northeast. The defendant, for three years past, has been diverting the water from this creek by pumping it out of this lake and conveying it in pipes over a ridge to a different water-shed, and into lakes which are drained by a small creek which empties into the Mississippi river at St. Paul. The city of St. Paul takes its water supply from these lakes, and the water has been so diverted and run into them to furnish water for the public water works of that city. The water so diverted amounted to nine or ten million gallons a day for much of the time for the last three years. The water is thus diverted and carried around St. Anthony falls and returned to the river ten or twelve miles below the falls. The plaintiffs own the banks of the river on both sides of the falls to low-water mark, and by reason thereof undoubtedly own the water power created by such falls, and the improvements made thereon. They bring these actions for damages for loss of power, caused by such diversion, and for an injunction restraining any such diversion of the water in the future.

It is well settled that the title to the bed of the Mississippi river below low-water mark is in the State of Minnesota, and the only reason the plaintiffs own the water power is because they own the banks of the river on both sides, and the shores of the islands in the river to low-water mark. The supreme court holds, that as against other owners of the shore less fortunately situated, the plaintiffs own this water power. But the plaintiffs are not now contesting the rights of others to use or divert the water for mere private purposes. Supplying the city water works of St. Paul is a public purpose. Is it such a public purpose that the right to it is paramount to the rights of plaintiffs? That is the question in this case.

82 The charter of the city of St. Paul clearly authorizes its water works board to go beyond the territorial limits of St. Paul, and beyond the limits of Ramsey county, into other counties, and by condemnation proceedings acquire the right to take water from any stream or lake and conduct the same to the

city. But it was not intended by this to require the city to pay private parties for what, as against the public, such private parties did not own.

Then, in my opinion, the water board has a right to divert this water, if the State could give them such right. Can the State give them such right? The bed of the Mississippi river is held by the State of Minnesota in its sovereign capacity as a public trust, for the purpose of applying the water flowing over such bed for such public uses as, in the nature of things, it should be applied. Such public uses are paramount to all private rights. What are the public uses, — which, in the nature of things, the water may be so applied? Plaintiffs admit that navigation is one of those uses; but they claim it is the only one.

I do not think so. It is the experience of all ages that great cities grow up on the banks of great rivers and usually draw their water supply from the river. Such water supply for domestic use, and for all such uses as water is ordinarily furnished by city water works, is as public in character as the streets through which it is conveyed, or the river from which it is drawn.

Counsel for plaintiffs cite many cases in which it is stated that the right of the public is the right of navigation, and implying that it is the only right. In those cases there was no question involved but the question of navigation; and where it is stated or inferred that the public has no other right, is mere dicta. There is no question but what this is untrue; there are many other rights which cannot be questioned. Such for instance as fishing and bathing by the public. If the plaintiffs' position is correct, the public could not fish from the middle of a public bridge crossing the Mississippi river. The question to be determined is, whether taking

83 water for the use of a city is one of those public rights that are paramount to the private rights of riparian owners. I think it is.

It is true that such water is ordinarily drawn from the river just above, or in the immediate vicinity of the city, while in this case they have diverted the water many miles above the city.

The amount of water which may be diverted for private purposes from the stream depends on the reasonableness of the use to which it is put, that is, how great a proportion of all the water in the stream is taken and not returned in the immediate vicinity, and how near the place of taking is it used. In this case, though the use is public, it might perhaps be held that the water is diverted from the river at an unreasonable distance from the place of using, were it not for the express legislative authority to take it at such distance. But it is questionable, if, as against these plaintiffs, this water is taken at an unreasonable distance from the place of use.

The cities of Minneapolis and St. Paul are really one commercial center, though two separate municipal corporations. If St. Paul took her water direct from the Mississippi river, it might be unreasonable to require her to take it below Minneapolis, where the water has become foul; but she might be entitled to go above the falls, where the water is more pure, and thus divert it from the plaintiffs.

It makes no difference to the plaintiffs whether the water is diverted directly from the river just above the falls, or from Rice creek ; the effect on the plaintiffs is the same.

To sustain their position that navigation is the only public use of the water that is paramount to the rights of riparian owners, plaintiffs' attorneys cite the case of *Stein vs. Burden*, 24th Alabama, 130, and *Smith vs. Rochester*, 92 N. Y., 463, as authority to the effect that taking water for the use of a city is not a public use that is

paramount to the rights of such owners. In one of these
84 cases the water was taken out of a small lake, and in each case was diverted from a small stream, to the bed of which the riparian owners held title *to the bed*. The usufruct of the riparian owner is very different in such a case. In such a case his right to the use of the water is absolute, subject only to the rights of other riparian owners, and to the public easement of navigation. In such a case it may be said that he owns the water absolutely, subject only to the right of the next riparian owner to own it in turn ; but subject also to the public easement of navigation. The general right to the water is in him, and only a special easement in the public. As against the public, he is the absolute owner, except as to the public easement of navigation. But when the title to the bed of the river is in the State, the rights of the riparian owner in the water are much more limited. The general right to the water is in the public, and only certain special easements in him.

It appeared by the evidence that the city water in St. Paul was used for water power to the extent of running the organs in three churches on Sunday ; but it does not appear from the evidence but that this water power is taken from the Lake Phalan system, which is a separate and independent system from the system of water works supplied by the water from Lake Baldwin. I am inclined to think that the city of St. Paul would have no right to use this water for the purpose of water power ; it is not one of the ordinary uses to which the public water supplies of cities have ordinarily been applied. But it does not appear that it has done so.

THOMAS CANTY.

The maps, Exhibits " G " and " H " are hereby made part of this record, and they or reproductions of the same may be used on argument in the district court, or in the supreme court, on appeal, by either party.

85 The above having been by me examined and found to be correct and conformable to the truth, I hereby certify that it contains all the evidence produced on said trial and all exceptions, and the same is hereby settled as a case with exceptions in each of the said actions, and ordered as such to be made part of the record therein.

Dated July 18, 1893.

THOMAS CANTY, Judge.

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

THE MINNEAPOLIS MILL COMPANY, Plaintiff,

vs.

THE BOARD OF WATER COMMISSION-S OF THE CITY OF ST. PAUL. }

Motion for a New Trial.

To the above-named defendant and to its attorneys, Leon T. Chamberlain, Esq., and Walter L. Chapin, Esq.:

Please take notice that at a special term of said court to be held at the court-house in the city of Minneapolis, in said county, on Saturday the 22d day of July, 1893, at nine o'clock in the forenoon, or as soon thereafter as counsel can be heard, the above-named plaintiff will make a motion before said court for an order setting aside the order heretofore filed herein dismissing said action and for a new trial herein; said motion will be based upon the following grounds:

1. That the order and decision of the court herein dismissing said action is not justified by the evidence, and is contrary to law.

2. On account of errors in law occurring at the trial and excepted to by plaintiff.

Said motion will be based upon the case with exceptions settled herein, and all the files and records in said action.

BENTON, ROBERTS & BROWN,

Attorneys for Plaintiff.

86 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial Dist.

THE ST. ANTHONY FALLS WATER POWER CO.

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL. }

Motion for a New Trial.

To the above-named defendant and to its attorney-, Leon T. Chamberlain, Esq., and Walter L. Chapin, Esq.:

Please take notice that at a special term of said court to be held at the court-house in the city of Minneapolis, in said county, on Saturday, the 22d day of July, 1893, at 9 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the above-named plaintiff will make a motion before said court for an order setting aside the order heretofore filed herein dismissing said action and for a new trial herein; said motion will be based upon the following grounds:

1. That the order and decision of the court herein dismissing said action is not justified by the evidence, and is contrary to law.

2. On account of errors in law occurring at the trial and excepted to by plaintiff.

Said motion will be based upon the case with exceptions settled herein, and all the files and records in said action.

BENTON, ROBERTS & BROWN,
Attorneys for Plaintiff.

87 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

MINNEAPOLIS MILL COMPANY, Plaintiffs,
vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Defendant. }

Order Denying Motion for New Trial.

The above-entitled cause came on for hearing before me at a special term of said court on Saturday, July 22d, 1893, on the motion of said plaintiff for a new trial; Messrs. Benton, Roberts & Brown appearing for said plaintiff and Walter L. Chapin appearing for said defendant. After hearing counsel on said motion and having considered the same,

It is ordered that the said motion be and the same is hereby denied.

By the court:

THOMAS CANTY, *Judge.*

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Judicial District.

MINNEAPOLIS MILL COMPANY, Plaintiff,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Defendant. }

Notice of Appeal.

To Leon T. Chamberlain and Walter L. Chapin, Esq., attorneys for said defendant, and to C. N. Dickey, clerk of said court:

88 Please take notice that the above-named plaintiff appeals to the supreme court of the State of Minnesota from the order of said district court entered herein on the 22d day of July, 1893, denying plaintiff's motion for a new trial and from the whole thereof.

Dated this 22d day of July, 1893.

BENTON, ROBERTS & BROWN,
Attorneys for Plaintiff.

Due service of the within notice of appeal is hereby admitted this 22d day of July, 1893.

LEON T. CHAMBERLAIN,
WALTER L. CHAPIN,
Attorneys for Defendant.
C. N. DICKEY,
Clerk of said Court.

Bond on appeal is hereby waived.

LEON T. CHAMBERLAIN,
WALTER L. CHAPIN,
Attorneys for Defendant.

89 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

ST. ANTHONY FALLS WATER POWER Co., Plaintiff, }
vs. }
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, }
Defendant. }

Order Denying Motion for New Trial.

The above-entitled cause came on for hearing before me at a special term of said court on Saturday, July 22, 1893, on the motion of said plaintiff for a new trial, Messrs. Benton, Roberts & Brown appearing for said plaintiff, and Walter L. Chapin appearing for said defendant. After hearing counsel on said motion, and having considered the same,

It is ordered that the said motion be and the same is hereby denied.

By the court:

THOMAS CANTY, *Judge.*

90 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

ST. ANTHONY FALLS WATER POWER Co., Plaintiff, }
vs. }
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, }
Defendant. }

Notice of Appeal.

To Leon T. Chamberlain and Walter A. Chapin, Esq., attorneys for said defendant, and to C. N. Dickey, clerk of said court:

Please take notice that the above-named plaintiff appeals to the supreme court of the State of Minnesota from the order of said dis-

trict court, entered herein on the 22d day of July, 1893, denying plaintiffs' motion for a new trial, and from the whole thereof.

Dated this 22d day of July, 1893.

BENTON, ROBERTS & BROWN,
Attorneys for Plaintiff.

Due service of the within notice of appeal is hereby admitted this 22d day of July, 1893.

LEON T. CHAMBERLAIN,
WALTER L. CHAPIN,
Attorneys for Defendant.
C. N. DICKEY,
Clerk of said Court.

Bond on appeal is hereby waived.

LEON T. CHAMBERLAIN AND
WALTER L. CHAPIN,
Attorneys for Defendant.

Dated July 22, 1893.

91 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, 4th Jud. Dist.

THE MINNEAPOLIS MILL COMPANY, Plaintiff,
against
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, }
Defendant. }

Affidavit of Disbursements on Trial and Notice of Tactation of Costs.

Defendant's costs and disbursements.

Statute costs..... \$10 00

Disbursements.

Sheriff's fees.....
2 affidavits..... 50
Jury fee..... 1 73
Clerk's fees (to be taxed).....

Witnesses' fees:

Mr. Sewell,	witness fees 4 days, 20 miles travel.....	2 60	} Each case one-half.
Jno. Caulfield,	" " " " " " " ".....	2 60	
L. W. Rundlett,	" " " " " " " ".....	2 60	
Martin Frist,	" " " " " " " ".....	2 60	
Prist Biurent,	" " " " " " " ".....	2 60	
Ass't Eng'r Munster,	" " " " " " " ".....	2 60	
Andrew Rinker,	" " " " " " " ".....	2 60	
O. A. Winslow,	" " " " " " " ".....	2 60	

\$35 03

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Leon T. Chamberlain, being duly sworn, says that he is the attorney in the above-entitled action; that the foregoing bill and

items of disbursements therein are just and correct and have been necessarily paid or incurred therein.

LEON T. CHAMBERLAIN.

Subscribed and sworn to before me on this 1st day of June, 1894.
[L. S.] OSCAR SANDELL,

Notary Public, Ramsey County, Minn.

No one opposing, the above bill of costs and disbursements taxed and allowed at \$33.03 this 5th day of June, 1894.

C. N. DICKEY, *Clerk*,
By C. B. TIRRELL, *Deputy*.

To Benton, Roberts & Brown, attorney- for plaintiff, Minneapolis, Minn.

DEAR SIR:- Please to take notice that on the 5th day of June, A. D. 1894, at 10 o'clock a. m., application will be made to C. N. Dickey, Esq., clerk of said court, at his office, in the court-house, in the city of Minneapolis, Minn., to have the foregoing items of costs and disbursements taxed and inserted in the judgment to be entered herein.

Dated June 1st, 1894.

Yours respectfully,

LEON T. CHAMBERLAIN,
Attorney for Defendant.

It is agreed that the within costs are correct and may be taxed as set forth.

June 5th, 1894.

BENTON, ROBERTS & BROWN,
Attorney- for Plaintiff.

Filed June 5, 1894.

C. N. DICKEY, *Clerk*,
By C. B. TIRRELL, *Deputy*.

92 STATE OF MINNESOTA, }
County of Hennepin, } ss:

District Court, Fourth Judicial District.

MINEAPOLIS MILL COMPANY, Plaintiff,	}	Judgment, April 19, 1894.
<i>against</i>		
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Def't.		

This cause, having been regularly placed upon the calendar of the above-named court for the April, A. D. 1893, general term thereof, came on for trial before the court and a jury duly impanelled and sworn to try the same on the 22nd day of May, A. D. 1894. Defendant having withdrawn its counter-claim, the jury was discharged; and the court, after hearing the evidence adduced at said trial in behalf of plaintiff and being fully advised in the prem-

ises, did, on the 26th day of May, A. D. 1893, duly make and file its order of dismissal and judgment herein.

Now, pursuant to said order and on motion of Leon T. Chamberlain, Esq., attorney for defendant, it is hereby adjudged that this action be, and the same is hereby, dismissed, and that the defendant recover of the plaintiff the sum of thirty-three and $\frac{3}{100}$ dollars.

By the court :

C. N. DICKEY, *Clerk*,
By C. B. TIRRELL, *Deputy*.

\$33.03.

[Endorsed:] No. 55120. District court, Hennepin county. Minneapolis Mill Company vs. Board of Water Com'rs, &c. Judgment-roll. Costs, \$33.03. Costs inserted and docketed June 5, 1894, at 12 m. Filed April 19th, A. D. 1894, at — o'clock — m. C. N. Dickey, clerk, by C. B. Tirrell, deputy.

93

Mandate.

STATE OF MINNESOTA, }
Supreme Court, } 88 :

The State of Minnesota to the hon. judge and officers of the district court of the fourth judicial district, sitting within and for the county of Hennepin, Greeting :

Whereas lately, in your court, in an action therein pending wherein Minneapolis Mill Company was plaintiff and The Board of Water Commissioners of St. Paul, defendant, a certain order was entered therein July 22, 1893, from which order said plaintiff appealed to this court;

And whereas the same was duly argued, heard, and submitted at the general October term, A. D. 1893, of our supreme court; after mature deliberation thereupon had, our supreme court did adjudge, determine, decree, and order "that the order of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent, defendant, above named have judgment accordingly;" a copy of the entry of judgment thereupon in this court is herewith transmitted and made a part of this remittitur :

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court in said hereinbefore-mentioned cause, and the same is hereby and herewith remanded to your court for such other and further record and proceedings therein as may be by law necessary, just, and proper under and by virtue of the said order herein made.

Witness the Hon. James Gilfillan, chief justice of the supreme court aforesaid, and the seal of said court, at St. Paul, this 16 day of April, A. D. 1894.

Supreme Court Seal.

C. P. HOLCOMB,
Clerk of the Supreme Court.

[Endorsed:] 55120. Supreme court, State of Minnesota. Mandate to the district court of Hennepin county. Minneapolis Mill Company, app't, against The Board of Water Commissioners of St. Paul, resp't. Filed Apr. 19, 1894. C. N. Dickey, clerk, by C. B. Tirrell, deputy.

94

Notice of Appeal.

STATE OF MINNESOTA, }
County of Hennepin, } 88:

District Court, 4th Judicial District.

THE MINNEAPOLIS MILL COMPANY, Plaintiff, }
vs. }
THE BOARD OF WATER COMMISSIONERS OF THE } Notice of Appeal.
CITY OF ST. PAUL, Defendant.

To Leon T. Chamberlain and Walter L. Chapin, attorneys for the above-named defendant, and C. N. Dickey, clerk of said district court:

Please to take notice that the above-named plaintiff appeals to the supreme court of the State of Minnesota from the judgment of the said district court entered herein, in the office of the clerk of said court, on the 19th day of April, 1894, in favor of the said defendant and against the said plaintiff, dismissing said action, and for the sum of 33 & $\frac{3}{100}$ dollars.

Dated this 6th day June, 1894.

BENTON, ROBERTS & BROWN,
Attorneys for Plaintiff.

95 [Endorsed:] State of Minnesota, district court, county of Hennepin. The Minneapolis Mill Company, plaintiff, vs. The Board of Water Commissioners of the City of St. Paul, defendant. Notice of appeal. Service of the within notice by delivery of copy thereof at St. Paul, Minnesota, this 6th day of —, A. D. 1894, is hereby admitted. Leon T. Chamberlain, Walter L. Chapin, attorneys for defendant. C. N. Dickey, clerk of said district court. H. J. Altnow. Benton, Roberts & Brown, attorneys for plaintiff, Minneapolis, Minn., 1004 Guaranty Loan building. Filed Jun-9, 1894. C. N. Dickey, clerk, by C. B. Tirrell, deputy.

96

Undertaking on Appeal.

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

MINNEAPOLIS MILL COMPANY, Plaintiff,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, }
 Def't. }

Whereas the above-named plaintiff has appealed to the supreme court of the State of Minnesota from a judgment rendered and entered in said action in said district court on the 16th day of April, 1894, dismissing said action, and for \$33 dollars and .03 cents, costs and disbursements taxed thereon:

Now, therefore, we, Charles A. Pillsbury and R. C. Leavitt, do undertake, promise, and agree to and with said defendant that said plaintiff shall prosecute said appeal with effect, and, if the said judgment appealed from or any part thereof is affirmed, that said plaintiff shall pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the said plaintiff upon the said appeal—

Conditioned, however, that all liability thereunder shall not exceed the sum of two hundred and fifty dollars.

Dated this 5th day of June, 1894.

CHARLES A. PILLSBURY. [SEAL.]
 R. C. LEAVITT. [SEAL.]

Signed, sealed, and delivered in the presence of—

H. E. COLEMAN.

ROME G. BROWN.

STATE OF MINNESOTA, }
County of Hennepin, } ss :

Be it known that on this fifth day of June, 1894, before me personally appeared Charles A. Pillsbury and R. C. Leavitt, to me known to be the persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.]

ROME G. BROWN,
Notary Public, Hennepin County, Minn.

STATE OF MINNESOTA, }
County of Hennepin, } ss :

Charles A. Pillsbury and R. C. Leavitt, the persons named in and who executed the foregoing undertaking, being first duly sworn,

STATE OF MINNESOTA, }
County of Ramsey, } ss:

Leon T. Chamberlain, being duly sworn, says that he is the attorney in the above-entitled action; that the foregoing bill and items of disbursements therein are just and correct and have been necessarily paid or incurred therein.

LEON T. CHAMBERLAIN.

Subscribed and sworn to before me on this 1st day of June, 1894.

[L. S.]

OSCAR SANDELL,
Notary Public, Ramsey County, Minn.

No one opposing, the above bill of costs and disbursements taxed and allowed at \$33.03 this 5 day of June, 1894.

C. N. DICKEY, *Clerk*,
By C. B. TIRRELL, *Deputy*.

To Benton, Roberts & Brown, attorney- for plaintiff, Minneapolis, Minn.

DEAR SIR:- Please to take notice that on the 5th day of June, A. D. 1894, at 10 o'clock a. m., application will be made to C. N. Dickey, Esq., clerk of said court, at his office, in the court-house, in the city of Minneapolis, Minn., to have the foregoing items of costs and disbursements taxed and inserted in the judgment to be entered herein.

Dated June 1st, 1894.

Yours respectfully,

LEON T. CHAMBERLAIN,
Attorney for Defendant.

Leon T. Chamberlain, attorney for def't.

It is agreed that the within costs are correct and may be taxed as set forth.

June 1st, '94.

BENTON, ROBERTS & BROWN,
Attorney- for Plaintiff.

Filed June 5th, 1894.

C. N. DICKEY, *Clerk*.
C. B. TIRRELL, *Deputy*.

98 STATE OF MINNESOTA, }
County of Hennepin, } ss :

District Court, Fourth Judicial District.

ST. ANTHONY FALLS WATER POWER COMPANY,	}	Judgment, April 19, 1894.
Plaintiff,		
against		
THE BOARD OF WATER COMMISSIONERS OF THE	}	
CITY OF ST. PAUL, Def't.		

This cause, having been regularly placed upon the calendar of the above-named court for the April, A. D. 1893, general term thereof, came on for trial before the court and a jury duly impanelled and sworn to try the same on the 22nd day of May, A. D. 1894. Defendant having withdrawn its counter-claim, the jury was discharged, and the court, after hearing the evidence adduced at said trial in behalf of plaintiff and being fully advised in the premises, did on the 26th day of May, A. D. 1893, duly make and file its order of dismissal and judgment herein.

Now, pursuant to said order and on motion of Leon T. Chamberlain, Esq., attorney for defendant, it is hereby adjudged that this action be, and the same is hereby, dismissed, and that the defendant recover of the plaintiff the sum of thirty-three and $\frac{3}{100}$ dollars.

By the court:

C. N. DICKEY, *Clerk*,
By C. B. TIRRELL, *Deputy*.

\$33.03.

[Endorsed:] No. 55121. District court, Hennepin county. St. Anthony Falls Water Power Co. vs. Board of Water Comm'rs, &c. Judgment-roll. Costs, \$33.03. Costs inserted in judgment and docketed on June 5, 1894, 12 m. Filed April 19th, A. D. 1894, at — o'clock — m. C. N. Dickey, clerk, by C. B. Tirrell, deputy.

99

Mandate.

STATE OF MINNESOTA, ss :

Supreme Court.

The State of Minnesota to the hon. judge and officers of the district court of the fourth judicial district, sitting within and for the county of Hennepin, Greeting :

Whereas lately in your court, in an action therein pending, wherein St. Anthony Falls Water Power Company was plaintiff and The Board of Water Commissioners of the City of St. Paul, defendant, a certain order was entered therein July 22, 1893, from which order said plaintiff appealed to this court :

And whereas the same was duly argued, heard, and submitted at the general October term, A. D. 1893, of our supreme court : After mature deliberation thereupon had our supreme court did adjudge,

determine, decree, and order "that the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent, defendant, above named have judgment accordingly." A copy of the entry of judgment thereupon in this court is herewith transmitted and made a part of this remittitur.

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court in said hereinbefore-mentioned cause, and the same is hereby and herewith remanded to your court for such other and further record and proceedings therein as may be by law necessary, just, and proper under and by virtue of the said order herein made.

Witness the Hon. James Gilfillan, chief justice of the supreme court aforesaid, and the seal of said court, at St. Paul, this 16 day of April, A. D. 1894.

Seal.

C. P. HOLCOMB,
Clerk of the Supreme Court.

[Endorsed:] 55121. Supreme court, State of Minnesota. Mandate to the district court of Hennepin county. St. Anthony Falls Water Power Company, app't, against The Board of Water Com'rs of St. Paul, resp't. Filed Apr. 19, 1894. C. N. Dickey, clerk, by C. B. Tirrell, deputy.

100

Notice of Appeal.

STATE OF MINNESOTA, }
County of Hennepin, } ss :

District Court, 4th Judicial District.

THE ST. ANTHONY FALLS WATER POWER COM- PANY, Plaintiff,	} Notice of Appeal
vs.	
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Defendant.	}

To Leon T. Chamberlain and Walter L. Chapin, attorneys for the above-named defendant, and C. N. Dickey, clerk of said district court:

Please to take notice that the above-named plaintiff appeals to the supreme court of the State of Minnesota from the judgment of the said district court entered herein in the office of the clerk of said court on the 19th day of April, 1894, in favor of the said defendant and against the said plaintiff, dismissing said action, and for the sum of thirty-three and $\frac{3}{100}$ dollars.

Dated this 6th day of June, 1894.

BENTON, ROBERTS & BROWN,
Attorney for Plaintiff.

101 [Endorsed:] State of Minnesota, district court, county of Hennepin. The St. Anthony Falls Water Power Company, plaintiff, *vs.* The Board of Water Commissioners of the City of St. Paul, defendant. Notice of appeal. Service of the within notice by delivery of copy thereof, at St. Paul, Minnesota, this 6th day of June, A. D. 1894, is hereby admitted. Leon T. Chamberlain, Walter L. Chapin, attorneys for def't. C. N. Dickey, clerk of said district court, by H. J. Altenow. Benton, Roberts & Brown, attorneys for plaintiff, 1004 Guaranty Loan building, Minneapolis, Minn. Filed Jun-9, 1894. C. N. Dickey, clerk, by C. B. Tirrell, deputy.

102 *Undertaking on Appeal.*

ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff,
vs.
 THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Def't.

Whereas the above-named plaintiff has appealed to the supreme court of the State of Minnesota from a judgment rendered and entered in said action in said district court on the 16th day of April, 1894, dismissing said action, and for thirty-three dollars and three cents costs and disbursements taxed therein :

Now, therefore, we, Chas. A. Pillsbury and R. C. Leavitt, do undertake, promise, and agree to and with said defendant that said plaintiff shall prosecute said appeal with effect, and if said judgment appealed from or any part thereof is affirmed that said plaintiff shall pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the said plaintiff upon the said appeal.

Conditioned, however, that all liability thereunder shall not exceed the sum of two hundred and fifty dollars.

Dated this 5th day of June, 1894.

CHARLES A. PILLSBURY. [SEAL.]
 R. C. LEAVITT. [SEAL.]

Signed, sealed, and delivered in the presence of—

H. E. COLEMAN.
 ROME G. BROWN.

STATE OF MINNESOTA, }
County of Hennepin, } ⁸⁸:

Be it known that on this 5th day of June, 1894, before me personally appeared Charles A. Pillsbury and R. C. Leavitt, to me known to be the persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.]

ROME G. BROWN,
Notary Public, Hennepin Co., Minn.

STATE OF MINNESOTA, }
County of Hennepin, } ss:

Charles A. Pillsbury and R. C. Leavitt, the persons named in and who executed the foregoing undertaking, being first duly sworn, doth each for himself depose and say that he is a resident and freeholder in the State of Minnesota and worth the amount of two hundred and fifty dollars above his debts and liabilities, exclusive of his property exempt from execution.

CHARLES A. PILLSBURY.
R. C. LEAVITT.

Subscribed and sworn to before me this 5th day of June, 1894.

[NOTARIAL SEAL.]

ROME G. BROWN,
Notary Public, Hennepin Co., Minn.

The within bond, being in the sum and by the sureties by me directed, is hereby approved this 9th day of June, 1894.

ROBERT D. RUSSELL, Judge.

Due service of the within bond admitted this 6th day of June, 1894. This bond as to form, amount, and sureties is satisfactory.

LEON T. CHAMBERLAIN,
WALTER L. CHAPIN,

Att'ys for Def't.

Filed Jun- 9, 1894.

C. N. DICKEY,
By C. B. TIRRELL, Deputy.

103 STATE OF MINNESOTA, }
County of Hennepin, } ss:

District Court, 4th Judicial District.

I, C. N. Dickey, clerk of the above-named court, do hereby certify that I have compared the papers-writing, to which this certificate is attached, with the original complaints, answers, replies, case with exceptions, decision, memoranda, motions for a new trial, orders denying a new trial, notices of appeal, affidavits of disbursements, and notices of taxation of costs, judgments, mandates, notices of appeal, and bonds in the actions therein entitled, as the same appears of record and on file in the said clerk's office, at the courthouse, in said Hennepin county, Minnesota, and find the same to be a true and correct copy thereof.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Minneapolis, this 18th day of June, A. D. 1894.

C. N. DICKEY, Clerk,
By C. E. DICKEY, Deputy.

[Endorsed:] District court, fourth judicial district, Hennepin county, State of Minnesota. Certified copy and return to supreme court. Minneapolis Mill Company *vs.* The Board of Water Commissioners of the City of St. Paul and The St. Anthony Falls Water Power Co. *vs.* The Board of Water Commissioners of the City of St. Paul.

104 [Endorsed:] 8983, 8984. The St. Anthony Falls Water Power Company, appellant, *vs.* The Board of Water Commissioners of the City of St. Paul. The Minneapolis Mill Company, appellant, *vs.* The Board of Water Commissioners of the City of St. Paul, respondent. Return on appeal.

Endorsed: Filed July 17, 1894. C. P. Holcomb, clerk.

105 STATE OF MINNESOTA:

Supreme Court.

MINNEAPOLIS MILL COMPANY, Plaintiff, Appellant,	}
<i>vs.</i>	
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,	}
Defendant, Respondent.	

ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff, Appellant,	}
<i>vs.</i>	
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,	}
Defendant, Respondent.	

Both cases.

It is hereby stipulated and agreed by the parties in the above-entitled actions that the hereto-attached Exhibits G and H shall be filed in said supreme court of the State of Minnesota as part of the record in said court in said actions and shall be certified to and returned as part of said record and as the Exhibits G and H respectively referred to in the testimony in said record.

BENTON, ROBERTS & BROWN,
Attorneys for Plaintiffs and Appellants in Both Actions.
 LEON T. CHAMBERLAIN,
 WALTER L. CHAPIN,
Attorneys for Defendant and Respondent in Both Actions.

(Here follow maps marked pp. 106 & 107.)

108 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1893.

DECEMBER 20, A. D. 1893,
 Wednesday morning, 9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

ST. ANTHONY FALLS WATER POWER COMPANY,	}	Cal. No., 191 ; Reg. No., 8395.
Appellant,		
<i>vs.</i>		
THE BOARD OF WATER COMMISSIONERS OF THE		
CITY OF ST. PAUL, Respondent.		

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued and submitted by counsel to the court for decision and taken under advisement.

A true record.

Attest :

C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest :

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

[Endorsed :] 8395. State of Minnesota, supreme court. Copy of minutes of argument. Filed April 16, A. D. 1894. C. P. Holcomb, clerk.

109 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1893.

ST. ANTHONY FALLS WATER POWER	}	No. 191. Appeal from Dis- trict Court, Fourth Judi- cial District, County of Hennepin.
COMPANY, Appellant,		
<i>vs.</i>		
THE BOARD OF WATER COMMISSIONERS		
OF THE CITY OF ST. PAUL, Respond-		
ent.		

This cause having been duly argued and submitted at the general October term of this court, A. D. 1893, upon the return to the appeal herein—

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appeal- from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered April 16, A. D. 1894.

By the court.

Attest :

C. P. HOLCOMB, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest :

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

72 ST. ANTHONY F. W. P. CO. VS. WATER COMMISSIONERS, ETC., &

[Endorsed:] No. 8395. State of Minnesota, supreme court. Copy of order for judgment. Filed April 16, A. D. 1894. C. P. Holcomb clerk. Entered on page —.

110 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1893.

ST. ANTHONY FALLS WATER POWER COMPANY, Appel-	}	No. 191.
lant,		
<i>vs.</i>		
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF	}	
St. PAUL, Respondent.		

Pursuant to an order of court duly made and entered in this cause on the sixteenth day of April, A. D. 1894—

It is here and hereby determined and adjudged that the order of the court below herein appealed from, to wit, of the district court of the fourth judicial district, sitting within and for the county of Hennepin, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said St. Anthony Falls Water Power Company, appellant herein, the sum and amount of fifty-five & $\frac{37}{100}$ dollars (\$55.37), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 16th day of April, 1894.

By the court.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, Clerk.

Statement for Judgment.

Costs allowed by statute.....	\$25 00
Clerk's fees for making return.....	
Printer's fees.....	21 62
Clerk's fees, supreme court.....	8 50
Filing mandate and docketing transcript.....	
Affidavits and acknowledgments.....	25
Postage.....	
Copying return for printer.....	
	<hr/>
	\$55 37

111 [Endorsed:] 8395. State of Minnesota, supreme court. St. Anthony Falls Water Power Company, appellant, *vs.* The Board of Water Commissioners of St. Paul, respondent. Transcript of judgment. Filed April 16, A. D. 1894. C. P. Holcomb, clerk.

STATE OF MINNESOTA, }
Supreme Court, } 88 :

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 16th day of April, A. D. 1894.

C. P. HOLCOMB, *Clerk.*

112 [Endorsed:] No. 8395. State of Minnesota, supreme court.
 St. Anthony Falls Water Power Company, appellant, against
 The Board of Water Commissioners of St. Paul, respondent. Judgment-roll. Filed April 16, 1894. C. P. Holcomb, clerk.

113 STATE OF MINNESOTA :

Supreme Court, General October Term, A. D. 1893.

DECEMBER 20, A. D. 1893,
 Wednesday morning, 9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

MINNEAPOLIS MILL COMPANY, Appellants,	}	Cal. No., 190 ; Reg. No., 8394.
<i>vs.</i>		
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent.		

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued and submitted by counsel to the court for decision and taken under advisement.

A true record.

Attest :

C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest :

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

[Endorsed:] 8394. State of Minnesota, supreme court. Copy of minutes of argument. Filed April 16, A. D. 1894. C. P. Holcomb, clerk.

74 ST. ANTHONY F. W. P. CO. VS. WATER COMMISSIONERS, ETC., &

114 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1893.

MINNEAPOLIS MILL COMPANY, Appel-)

lant,

vs.

THE BOARD OF WATER COMMISSIONERS
OF THE CITY OF ST. PAUL, Respond-)
ent.

No. 190. Appeal from Dis-
trict Court, Fourth Judi-
cial District, County of
Hennepin.

This cause having been duly argued and submitted at the gen-
eral October term of this court, A. D. 1893, upon the return to the
appeal herein—

Now, after full and mature deliberation had thereon, it is here
and hereby ordered that the order of the court below herein appeal-
from be, and the same hereby is, in all things affirmed, and that
the respondent above named have judgment accordingly.

Entered April 16, A. D. 1894.

By the court.

Attest :

C. P. HOLCOMB, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the
original order for judgment entered in the above-entitled cause.

Attest :

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

[Endorsed:] No. 8394. State of Minnesota, supreme court. Copy
of order for judgment. Filed April 16, A. D. 1894. C. P. Holcomb,
clerk. Entered on page —.

115 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1893.

MINNEAPOLIS MILL COMPANY, Appellant,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF
ST. PAUL, Respondent.

No. 190.

Pursuant to an order of court duly made and entered in this cause
on the sixteenth day of April, A. D. 1894—

It is here and hereby determined and adjudged that the order of
the court below herein appealed from, to wit, of the district court
of the fourth judicial district, sitting within and for the county of
Hennepin be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent
above named do have and recover of said Minneapolis Mill Com-
pany, appellant herein, the sum and amount of fifty-five & $\frac{37}{100}$ dol-

lars (\$55.37), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 16th day of April, 1894.

By the court.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute.....	\$25 00
Clerk's fees for making return.....	
Printer's fees.....	21 62
Clerk's fees, supreme court.....	
Filing mandate and docketing transcript.....	8 50
Affidavits and acknowledgments.....	25
Postage.....	
Copying return for printer.....	
	<hr/>
	\$55 37

116 [Endorsed:] 8394. State of Minnesota, supreme court.
Transcript of judgment. Filed April 16, A. D. 1894. C. P.
Holcomb, clerk.

STATE OF MINNESOTA, }
Supreme Court, } ss:

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 16th day of April, A. D. 1894.

C. P. HOLCOMB, *Clerk.*

117 [Endorsed:] No. 8394. State of Minnesota, supreme court.
The Minneapolis Mill Company, appellant, against The Board
of Water Commissioners of St. Paul, respondent. Judgment-roll.
Filed April 16, 1894. C. P. Holcomb, clerk.

STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1893.

MINNEAPOLIS MILL COMPANY, Appellant,	} Nos. 190, 191. Syllabus.
<i>vs.</i>	
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent.	
ST. ANTHONY FALLS WATER POWER COMPANY, Ap- pellant,	
<i>vs.</i>	
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent.	

1. The rights of riparian owners on navigable or public streams of water are subordinate to public uses of such water, and the rights of these appellants under their charters are equally subordinate to such public uses.
 2. The public have the right to apply the waters of a navigable stream to public uses without making compensation to riparian owners.
 3. The navigation of the stream is not the only public use to which these public waters may be applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and this right is not affected by the fact that consumers are charged for water used as a means of paying the cost of maintaining the plant.
 4. In thus taking water from navigable streams or lakes for ordinary public uses the State is not controlled by the rules which obtain between riparian owners as to the diversion from and return of water to its natural channels.
- 119 5. Certain provisions in respondent's charter relating to compensation for damages arising out of the taking and diversion of water construed: Held, that those provisions were not intended to provide for compensation to riparian owners on navigable or public streams.

120

8394, 8395.

STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1893.

MINNEAPOLIS MILL COMPANY, Appellant,

vs.

BOARD OF WATER COMMISSIONERS OF THE
CITY OF ST. PAUL, Respondent.ST. ANTHONY FALLS WATER POWER COM-
PANY, Appellant,

vs.

BOARD OF WATER COMMISSIONERS OF THE
CITY OF ST. PAUL, Respondent.

Nos. 190, 191. Opinion.

These cases were tried together in the court below, and when plaintiffs, appellants here, rested both actions were dismissed upon defendant's motion. From orders refusing new trials appeals were taken. Appellants are corporations created in 1856 by acts of the territorial legislature and authorized to build and maintain dams in the Mississippi river, at the falls of St. Anthony, about ten miles above St. Paul, for the development of water power and for the use and sale of such power. One of these corporations, owning the shore on the east side of the river, erected a dam to the proper point in the river channel, and the other, owning the east shore, built its dam so as to connect the two, thus forming a power which has ever since been maintained and used.

In 1883 the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. A board of water commissioners was created by the same act, and that board, a branch of the city government, is the present respondent. By the provisions of an amendatory act, G. L. 121 1885, ch. 110, sec. 5, *et seq.*, the board was authorized and empowered to add to its sources of supply and to draw water from any lake or creek, and in general to do any act necessary in order to furnish an adequate supply of water for the use of the city. The manner in which it should acquire the right to extend its works so as to connect with any body of water deemed necessary for an increased supply was specified, and in sec. 7 it was provided that "after making compensation as hereinafter provided to the owners of or the persons interested in the lands so to be taken and for damages by reason of diverting the water of any stream, creek, or body of water, said city shall have an easement therein." In sec. 8 provision was made for the appointment of commissioners to assess the damages sustained by the owners of lands to be taken, or by other persons by reason of such taking or arising by the construction, use, and operation of the works. Under this act the respondent duly established a pumping station at Lake Baldwin, a

body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dam built and maintained by appellants. Claiming that the result of this diversion of water was to greatly diminish the volume which came to the dam and to materially affect and reduce the water power, appellants brought these actions to restrain and enjoin perpetually the operation of respondent's works at the lake and the diversion of water therefrom.

Counsel for both parties made lengthy oral arguments and have filed very full briefs. Many questions have been discussed which we do not regard as connected with the case, and hence we need not refer to them. There are a few well-settled principles which we regard as covering and controlling the facts before us, and a statement of these, with a construction of certain parts of the act under which respondent's board was authorized to obtain further and other sources of water supply, will dispose of these appeals.

122 1. The appellants are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream, and their rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

2. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

3. The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities, through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city water works, does not affect the real character of the use or deprive it of its public nature.

4. In thus taking water from navigable streams or lakes for such ordinary public uses the power of the State is not limited or controlled by the rules which obtain between riparian owners as to the diversion from and its return to its natural channels. Once conceding that the taking is for a public use and the above proposition naturally follows.

5. Turning now to the provisions of respondent's charter, ch. 110, *supra*, it will be seen that the board was not limited to public waters as the sources of its contemplated additional supplies. It

123 was authorized to appropriate private waters for the purpose, and hence the provisions of the act which provided for the ascertaining of and making compensation for damages caused by a diversion of water must be construed as applying solely to cases where the board took private property by using or diverting merely private waters. Inasmuch as the State itself could use the waters in question as against the appellants without compensation, it would require very clear language to that effect to justify the conclusion that the legislature intended to impose on respondent board the burden of paying appellants for what as against the public they did not own. If the right granted by the legislature had been exclusively to divert waters from a certain specified body of public water, such as one of the "great" ponds of Massachusetts, referred to in the cases cited from the reports of that State, so that the provisions in ch. 110, relating to compensation, could not apply to anything else, to the owners of private waters, for instance, the construction contended for by appellants that it was intended they should be compensated in case damages resulted might arise by implication.

Orders affirmed.

COLLINS, J.

The chief justice did not sit. Vanderburgh, J., took no part in the decision.

124. Endorsed: No. 8394, 8395. State of Minnesota, supreme court. Minneapolis Mill Company *vs.* Board of Water Commissioners of St. Paul. St. Anthony Falls Water Power Co. *vs.* Board of Water Commissioners of St. Paul, resp't. Opinion and syllabus. Filed February 9, 1894. C. P. Holcomb, clerk. October term, A. D. 1893. Collins, J.

125 STATE OF MINNESOTA:

Supreme Court, October Term, 1893.

MINNEAPOLIS MILL COMPANY, Appellant,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,
Respondent.

ST. ANTHONY FALLS WATER POWER COMPANY, Appellant,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,
Respondent.

(Two cases.)

Petition for Rehearing.

To the supreme court of the State of Minnesota:

The above-named appellants and each of them hereby respectfully petition the supreme court of the State of Minnesota to grant

the said appellants and each of them a rehearing and reargument in the above-entitled cases. This petition is based upon the ground that in considering the said cases and in rendering the decision heretofore filed in the same the said court has overlooked and has failed to consider certain facts, statutes, and matters which, as appellants believe, if the said court had taken into consideration and not so overlooked, the said decision must necessarily have been different from that which has been rendered, and because the said appellants believe that upon a consideration of the said matters overlooked and failed to be considered and upon a reargument and a rehearing of said cases the decision of the said court will be contrary to the decision already filed.

I.

The court overlooked and failed to consider the effect of the act of Congress passed February 26th, 1857, entitled "An act to authorize the people of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States," and particularly section 2 of said
126 act, fixing the jurisdiction of the State of Minnesota over the Mississippi river and all waters tributary thereto, and also section 3 of article 2 of the constitution of the State of Minnesota, accepting and ratifying said act of Congress.

Section 2 of the act of Congress referred to provides as follows:

"That the State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State, and any State or States now or hereafter to be formed or bounded by the same; and said river or waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor."

Section 3 of article 2 of the State constitution provides as follows:

"The propositions contained in the act of Congress entitled 'An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States' are hereby accepted, ratified, and confirmed and shall remain irrevocable without the consent of the United States."

Before the admission of Minnesota into the Union the control and title which any sovereign power had in the waters of the Mississippi river and its tributaries belonged to the United States. This is a proposition which needs no authorities to support it. If the title and control of all the lands and waters within the boundaries of the proposed new State had been transferred to the new State, impliedly or expressly by the fact of its organization or admission, without any reservation, then it might be true that the entire sovereign power and control of such lands and waters was vested in the new State forever under such restrictions only as could be inferred from the general law on the subject of such powers and control of

the State. In such a case, then, if the general law in regard to such restrictions was and is as laid down in the opinion already filed by this court in these cases, it might be said, so far as this point
127 is concerned, that the diversion shown in this case was not an unlawful one.

But the power and control which the State of Minnesota was to have over the Mississippi river and its tributaries was expressly limited by the act of Congress above quoted. Whatever the power of the State and its legislature might have been without such an act, under that act the jurisdiction and trust imposed upon the new sovereign power was expressly limited as to the Mississippi river and all waters tributary thereto. It was to be a trust for the purpose of preserving all such waters free, intact, and undiminished for a public highway. This purpose is expressly stated in the act of Congress as the one for the purpose of which the new State was to have jurisdiction over all such waters. No other purpose or object is stated, either impliedly or otherwise, and under the well known principle that the express statement of one clearly defined object is of itself an exclusion of any and all others this act of Congress cannot be enlarged by construction; it must be taken as applying to this one particular object and to exclude all other purposes and objects.

This construction is further enforced by the express provision of the constitution of this State above quoted. The propositions of that act of Congress are "accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States." Even without this provision of the State constitution the construction which we here contend for would have to be accepted as binding upon the State, but with the additional provision of the State constitution the objection which we here raise is not only sustained expressly by a proper construction of this act of Congress, but is also sustained by the State constitution.

The record shows that ever since 1856 and prior thereto these appellants have been in possession of the riparian land and rights and structures now owned and held by them. This extends back to a time before the organization of the State and before this act of Congress of 1857. They were in such possession and ownership at the time this act of Congress was passed and when the State was admitted under that act, consequently no greater rights or power
128 in the control of these waters naturally flowing past appellants' land could have, since 1857, been acquired as against these appellants than was held by the State at the moment of its admission into the Union. We have shown that at that time the State had control only for the purpose of navigation by reason of that act of Congress, even if there were no other reason, and what the State itself did not have in its sovereign capacity the people which go to make up the "public" could not have or acquire as against these appellants.

The result is that these appellants have the right to the use of all the water flowing past their lands from sources tributary to the Mississippi, subject only to the control of the State and those waters

in the interest of navigation or for the purpose of keeping such waters open for a public highway. Consequently an act of the legislature which, as it has thus far been construed by this court, gives authority which permits a diversion of these waters for other purposes than navigation, is in direct contravention of this act of Congress, and also in contravention of the State constitution. Respondent, therefore, gets no authority by the legislative act of 1885 to divert the waters of the Mississippi or its tributaries for any of its purposes. If it does so divert, it is liable in damages and an injunction will lie.

The point which we make here we made in our brief at the former hearing and mentioned in the argument, although in the limited time given no opportunity was had for a full discussion. On page 14 of our brief we said :

"To authorize a diversion (for other purposes than for navigation) would be a breach of the trust imposed upon the State, and it is doubtful if such a diversion could be made even for compensation."

And we there cited the statement of this court in which it refers to this act of Congress and in which this court implies that this act of Congress has an important effect in restricting the extent of the trust imposed upon the State in regard to the waters of the Mississippi and of its tributaries.

"Whether, in view of the fact that the rights of the State to the stream and its bed are sovereign and not proprietary, and are held by it in trust for the public as a highway, and the further fact that Congress has, in the act authorizing a State government, expressly provided that the Mississippi river and the waters leading
129 into the same shall be common highways and forever free to the inhabitants of the State and all other citizens of the United States, the legislature has the power to divert the bed of the St. Croix from the trust for which it was vested in the State and destroy the public use of it as a public highway, is a question not here involved and which we do not consider. It is sufficient to say that they cannot by such grant impair or take away the riparian rights of the respondents without compensation."

Union Depot Company *vs.* Brunswick, 31 Minn., 297.

In that case the only question involved was whether compensation should be paid. In this case we ask for an injunction, and any ground which shows that the diversion is unauthorized is sufficient ground for such injunction.

We believe that the effect of this act of Congress and the point which we raised in regard to it was overlooked by this court in its recent decision, and we ask for a rehearing of the case on that ground.

II.

The court overlooked the fact, shown by the record, that the uses to which the water diverted was put by respondent were to a large extent such uses as do not constitute in any sense of the word a "public" use, and that as the right of appellants to use the water cannot be subjected to any private use, to refuse appellants the

remedy against such diversion for private use is to take the property of one person and give it to another, all of which is contrary to our State constitution and contrary to the Constitution of the United States.

The record shows:

"The faucets and outlet pipes through which this water is taken are in manufacturing buildings and in business buildings of all kinds in the city of St. Paul."

Folio 295, paper book.

"In St. Paul there are a large number of public buildings, * * * boot and shoe manufactureries, buildings that are run by steam boilers, and other manufacturing buildings that are run by steam. We supply water for some of these buildings and for some of the manufacturing buildings. * * * They have a right to use it to fill their steam boilers and for laundry purposes. The water department gives them the right in these buildings and other buildings to use it for boilers and steam, and there are other manufacturers that the water department gives the same right to for filling steam boilers which are used for the purpose of running engines for power, all of which are owned by private individuals. We have three motors in the city in churches, that are used for running organs. * * * Any customer who will take the water and pay for it we allow to use it in filling boilers for manufacturies."

Folio- 300-303, paper book.

"The water which is measured by meters amounts to a million gallons a day. We measure the water in all the large establishments and in all the manufacturing establishments by meter."

Folio- 307, 308, paper book.

Thus nearly one-fifth of the water used by respondent is used in the manufacturing establishments owned by private individuals in that city. Whatever may be said of the "public" nature of the use of the water for culinary and domestic purposes and the ordinary purposes of city use, it cannot be said that the use for private manufacturing purposes is in any sense a "public" use of the water, or that it is one to which a riparian owner's use of the water naturally flowing past his land is in any way subject. Appellants use this water for manufacturing purposes, and it is almost the only use to which it is put by them. They are riparian owners on the river and entitled to use it for such purpose. By what construction can it be said that their right to use this water for these purposes is subject to the right of other private interests away from the stream to use it for the same purpose? And those private interests at the same time have no claim to the water by reason of their situation, and want to get it indirectly through the medium of respondent, while it is furnishing water for other purposes more properly called "public." To say that appellants' use is subject to such other private uses and to allow a diversion which is confessedly for the purpose of supplying such private uses is to take from those whose

natural position gives them a natural right to the use and give it to others who have no *calim* by reason of their situation.

131 While the amount of water here concerned is by no means small, still the question of the amount has really nothing to do with the determination of this case. The same rule which would allow at present one million gallons for manufacturing purposes would allow in the future ten times that amount if there were consumers demanding it. The same principle also which would allow a small fraction of the waters of the Mississippi river to be taken from riparian owners for such private purposes would allow the drying up of other streams for the same purpose and with similar and more serious results.

Assuming that the right of respondents to the use of the waters is subject to the ordinary use of cities in the vicinity of the river, on the ground that those uses are public, still when it is shown that those uses are not properly "public," but are private in their nature or include uses which are private in their nature, the diversion becomes unlawful as against the riparian owner; otherwise there would be a taking of private property from one person for the private use of another person, and such taking is not allowed by any legal principle. It is a taking without due process of law, and is contrary to our constitution as well as that of the United States.

We believe that these facts and the legal principles relative thereto were overlooked by this court in reaching the decision already filed, and we ask for a rehearing and reargument on this ground.

So far as the above two grounds for a rehearing are concerned, we have assumed the correctness of the decision already filed, except for the two points named. While the grounds for our petition are those named, we further urge that a reargument be allowed for the purpose of more fully stating our position as to the rights of appellants on other grounds. The questions involved are momentous ones. Large property interests are at stake. We believe, on a further and fuller consideration, this court will not adhere to its former decision, even on points which seem to have been considered by it.

On the two points mentioned as a ground for a reargument, we specially ask for an opportunity to submit further authorities
132 and reasons. While these points were mentioned in our brief and also in our argument, the other and more general questions involved prevented a detailed discussion of these, and in considering those more general questions the court has evidently failed to take into consideration these points, which alone, we believe, would necessitate a decision in favor of appellants.

Dated February 16, 1894.

Respectfully submitted.

BENTON, ROBERTS & BROWN,

Attorneys for Appellants.

133 [Endorsed:] Court No. —. Office No. —. Supreme court,
State of Minnesota. Minneapolis Mill Company, appellant,
vs. Board of Water Commissioners of St. Paul, respondent. St. An-

thony Falls Water Power Co., appellant, *vs.* Board of Water Commissioners of St. Paul, respondent. (Two cases.) Petition for rehearing.

Endorsed: Filed February 19, 1894. C. P. Holcomb, clerk. Benton, Roberts & Brown, attorneys for appellants, 1004 Guaranty Loan building, Minneapolis, Minn. Due and personal service of the within is hereby admitted this — day of —, 189—. — —, att'y for —.

134 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1894.

APRIL 9TH, A. D. 1894—Monday morning, 9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present excepting Associate Justice Buck.

MINNEAPOLIS MILL COMPANY, Appellant,	}	Cal. No., 190.
<i>vs.</i>		" " 191.
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent.		Reg. No., 8394.
ST. ANTHONY FALLS WATER POWER COMPANY, Appellant,		" " 8393.
<i>vs.</i>		
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent.		

These causes came on to be heard this day upon the application of counsel for appellant for leave to reargue the same.

Now, after due deliberation thereupon had, it is ordered that such application in each of said causes be, and the same is, denied and the order heretofore entered staying proceedings therein vacated.

A true record.

Attest:

C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument and order in the above-entitled cause.

Attest:

C. P. HOLCOMB, *Clerk.*

[Endorsed:] State of Minnesota, supreme court. Copy of minutes of argument. Filed — —, A. D. 189—. — —, clerk.

135 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1894.

JULY 18TH, A. D. 1894,
Wednesday morning, 9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.